TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 203

THE CITY OF NEW YORK, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 16, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

SUPREME COURT OF THE UNITED STATES

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THE CITY OF NEW YORK, PETITIONER,

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., Nov. 3, 1952.

—4671

[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor

THE CITY OF NEW YORK, Appellant, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Appellee.

In Proceedings for the Reorganization of a Railroad

No. 16562

STATEMENT UNDER RULE 15B

This proceeding was commenced on November 8, 1950 by service upon the office of the Corporation Counsel for the City of New York of a petition, verified on November 2, 1950, for instructions as to whether the plan of reorganization required the payment of certain assessments to the City of New York, and if the said instructions are in the negative that the Court direct the cancellation of such assessments.

The memorandum of decision of Hincks, U. S. D. J., was handed down on August 8, 1951 and the order and decree was made and filed on September 5, 1951. The City of New York filed a notice of appeal from this order and decree on September 19, 1951.

The above named appellee originally appeared by Hermon J. Wells, Esq., whose place has been taken by Edward R. Brumley. The appellant, the City of New York, originally appeared by John P. McGrath, Corporation Counsel, who has since been succeeded by Denis M. Hurley, present Corporation Counsel.

There have been no other changes in either the original parties or counsel, except as mentioned above.

[fol. 2] IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor

PETITION

Now comes The New York, New Haven and Hartford Railroad Company and respectfully represents to this Court:

1. Prior to the Commencement of the reorganization proceedings of your petitioner on October 23, 1935 under Section 77 of the Bankruptcy Laws of the United States, the City of New York from time to time laid upon certain real property belonging to and in the possession of your petitioner in the City of New York, County of The Bronx and the State of New York certain assessments for local improvements, of which those still outstanding and unpaid on real property owned and possessed by your petitioner are shown more particularly on a sheet marked Exhibit A, which is attached hereto and made a part hereof.

2. The City of New York at all times herein mentioned was and is a municipal corporation organized and existing under the laws of the State of New York.

3. In accordance with the laws of the State of New York, each of the aforesaid assessments, insofar as they [fol. 3] were valid and not void, became a lien in favor of the City of New York against the particular real property involved, until paid in full, as soon as its title and date of confirmation were entered in the record of the titles of assessments confirmed, together with the date of entry.

4. None of the assessments set forth on said Exhibit A has been paid in full because your petitioner believes them to be invalid and void, but the City of New York has claimed and asserted and continues to claim and assert that they constitute valid and enforcible claims, protected by valid and enforcible liens, upon the real property of your petitioner.

5. Since September 18, 1947, the effective date of the consummation order and final decree in the proceedings for the reorganization of your petitioner, repeated at-

tempts by your petitioner to sell, and to collect awards for the taking of, real property free and clear of the aforesaid assessments and liens without payment of the amounts due on the assessments have been resisted by the City of New York, and the City of New York has refused to cancel, discharge or remove any such assessments and liens of record without receiving payment in full.

6. Since September 18, 1947, the City of New York, though requested to do so by your petitioner, has refused to cancel, discharge or remove of record any of the assessments set forth in said Exhibit A, and still refuses to do so.

7. The assessments set forth in said Exhibit A constitute a cloud upon the title of your petitioner to the real property involved and constitute a continuous embarrassment and annoyance to the operations of your petitioner.

8. The City of New York, although it had timely notice of the reorganizatiion proceedings of your petitioner, has [fol. 4] at all times knowingly and intentionally refused to file or evidence a claim or claims in said proceedings for any or all of the outstanding, unpaid assessments for local improvements in its favor upon the real property of your petitioner, including those set forth in said Exhibit A, even though by the terms of Order No. 32, dated January 4, 1936, this Court directed that claims of creditors of your petitioner must be filed or evidenced by May 1, 1936 in order to participate in its reorganization, and no such claim or claims has been filed or evidenced in said proceedings in behalf of the City of New York by any one else.

9. It is your petitioner's belief that nowhere in the plan of reorganization approved by this Court and by the Interstate Commerce Commission or in the consummation order and final decree of this Court is there any reservation made in favor of the assessments set forth in said Exhibit A or any direction to pay or assume them, but that on the contrary they and the liens connected therewith are now forever barred, void, and unenforcible and the real property of your petitioner is now free and clear thereof and unencumbered thereby and discharged and released therefrom.

10. In the consummation order and final decree of this Court, in paragraph 2 of part XI, jurisdiction was reserved to the Court in sub-paragraph (d) to consider and

act in the matter of any application for instructions with respect to the distribution of funds or securities in connection with the consummation order and to construe the plan of reorganization as to matters which may require construction, not dealt with in the consummation order, and in sub-paragraph (q) to take such further action as may be necessary to put into effect and carry out the consummation order and the plan of reorganization and all other orders relative thereto previously entered by the Court.

[fol. 5] 11. The actions of the City of New York since September 18, 1947 with respect to outstanding, unpaid assessments for local improvements against the real property of your petitioner are in violation of the consummation order and final decree of this Court, particularly of paragraph 1 of part XI thereof, which perpetually restrains and enjoins all interfering with, enforcing liens upon, or disturbing in any manner whatsoever the property of your petitioner and all interfering with or taking steps to interfere with your petitioner, the operation of its properties or the conduct of its business.

Wherefore, your petitioner respectfully prays:

(1) That this Court instruct your petitioner whether or not the plan of reorganization and the consummation order and final decree require the payment or assumption of any or all of the assessments set forth in said Exhibit A or make any reservations in their favor;

(2) That in the event said instructions are in the negative, this Court declare (a) that the real property of your petitioner allegedly subject to the assessments set forth in said Exhibit A is free and clear thereof and of all liens therefor, (b) that the City of New York, its successors and assigns, be and they are forever restrained, enjoined and barred from enforcing the same, from starting or attempting to start any action or proceeding to enforce the same, and from interfering with or disturbing your petitioner and its real property on account of the same, and (c) that the City of New York be directed and ordered to cancel, discharge and remove of record all of the assessments set forth in said Exhibit A;

(3) That an order be entered setting down this petition for hearing before this Court and directing your petitioner

[fol 6] to give reasonable notice thereof to the City of New York and to serve a copy of this petition together with said notice of hearing on the City of New York by mail or otherwise.

The New York, New Haven and Hartford Railroad Company, By Hermon J. Wells, Hermon J. Wells, Vice-President and General Counsel.

(Verified on November 2, 1950.)

[fol. 7]

EXHIBIT A, ANNEXED TO PETITION

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2591	38	573	Sewer East 138th Street	June 8, 1894	$ 88.88
		10	2558	1	906	Opening Cypress Avenue	February 1, 1897	30.07
		10	2599	298	982	Sewer Bungay Street	December 15, 1897	217.14
		10	2604	74				123.63
		10	2588	23	1068	Regulating East 137th Street	February 17, 1899	923.13
		10	2730	101	1223	Sewer Tiffany Street	June 15, 1900	1,539.10
		10	2730	101				24.98
		10	2731	5				730.72
		10	2731	61				420.42
		10	2733	55				344.37
		10	2734	30				463.70
		10	2592	28	1411	Sewer East 141st Street	March 8, 1901	943.89
		10	2599	141				514.42
		10	2599	Pt. 141				588.05
		10	2730	101	1451	Opening Longwood Avenue	August 10, 1901	56.84
		10	2759	388	1487	Opening Aldus Street	December 19, 1901	44.79
		9	2295	1	1504	Opening East 135th Street	February 20, 1902	60.69
		9	2295	48				20.82
		9	2308	45				110.08

[fol. 8]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2730	28	1547	Opening Craven Street	May 29, 1902	$ 40.32
		10	2558	1	1557	Opening East 130th Street	June 23, 1902	6.64
		10	2731	61	1568	Regulating Tiffany Street	June 27, 1902	98.04
		10	2733	55				98.04
		10	2730	101	1637	Opening Whitlock Avenue	January 7, 1903	286.95
		10	2730	101				2.66
		10	2759	388				44.99
		10	2591	38				7.41
		9	2260	62	1670	Opening East 132nd Stre-t	March 20, 1903	753.90
		9	2295	48				141.10
		10	2583	2				23.85
		10	2583	2				17.00
		10	2584	18				159.00
		10	2585	20				10.52
		10	2599	141	1721	Opening East 142nd Street	August 18, 1903	14.62
		10	2599	200				24.48
		10	2592	28	1736	Regulating East 141st Stre-t	November 4, 1903	495.85
		10	2599	141				308.90
		10	2730	101	1762	Regulating Longwood Avenue	December 29, 1903	1,459.66
		10	2731	5				497.33

[fol. 9]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2592	28	1768	Regulating Southern Boulevard	December 31, 1903	$ 5.56
		10	2599	141				28.31
		10	2741	1	1785	Sewer Farragut Street	April 20, 1904	649.83
		10	2741	66				297.67
		10	2759	388				907.58
		10	2584	18	1855	Paving East 133rd Street	December 15, 1904	424.43
		10	2585	20				406.46
		10	2741	1	1882	Opening Whitlock Avenue	March 4, 1905	180.36
		10	2741	66				124.99
		10	2592	28	1954	Paving East 141st Street	July 13, 1905	429.46
		10	2599	141				234.07
		10	2599	141				267.55
		10	2730	Pt. 28	1963	Opening Leggett Avenue	August 2, 1905	2,145.34
		10	2730	Pt. 28				28.92
		10	2730	28				2,049.96
		10	2730	Pt. 28				49.09
		10	2730	28				118.70
		10	2730	28				378.93
		10	2730	28				21.46

[fol. 10]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2731	5	1974	Regulating Lafayette Avenue	October 3, 1905	$ 39.80
		10	2731	5				80.83
		10	2731	61				72.36
		10	2731	61				296.00
		10	2558	1	3008	Acquiring title East 149th Street	December 14, 1906	1.02
		10	2730	28	3030	Opening Randall Avenue	February 20, 1907	10.33
		10	2730	28				78.65
		10	2730	28	3046	Opening Lafayette Avenue	March 19, 1907	0.23
		10	2730	101				50.85
		10	2730	101				4.74
		10	2730	101				15.83
		10	2730	101				34.75
		10	2730	101				13.05
		10	2731	5				5.71
		10	2731	5				17.22
		10	2731	5				121.31
		10	2731	61				313.88
		10	2731	61				481.32
		10	2733	55				1,205.64
		10	2759	100				135.62
		11	3017	6	3069	Regulating Westchester Avenue	April 23, 1907	1,281.29
								1,932.12

[fol. 11]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2591	38	3108	Regulating East 140th Street	July 2, 1907	$ 259.94
		10	2592	28				258.24
		10	2731	61	3127	Sewer Whitlock Avenue	August 13, 1907	31.68
		11	3017	6	3138	Regulating Edgewater Road	September 12, 1907	487.28
		10	2588	23	3145	Paving East 136th Street	September 12, 1907	407.63
		9	2260	62	3173	Opening East 133rd Street	November 12, 1907	60.90
		10	2731	61	3175	Opening Barretto Street	November 18, 1907	12.60
		10	2731	61				1.89
		10	2733	55				703.10
		10	2741	1				47.99
		10	2741	1	3200	Opening Coster Street	February 3, 1908	22.38
		11	3017	6	3220	Receiving Basin West Farms Road	March 19, 1908	73.05
		10	2590	45	3222	Regulating East 139th Street	March 24, 1908	426.66
		10	2591	38				426.66

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EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2591	38	3247	Sewer East 140th Street	May 12, 1908	$ 748.53
		10	2592	28				748.53
		10	2590	45	3255	Sewer East 139th Street	May 21, 1908	714.85
		10	2591	38				714.85
		15	4025	27	3268	Opening White Plains Road	June 10, 1908	237.59
		15	4041	1				198.24
		15	4018	22	3269	Opening White Plains Road	June 12, 1908	21.80
		10	2730	28	3322	Opening East 149th Street	November 16, 1908	0.21
		10	2759	388				.02
		11	3017	6				.15
		10	2583	2				.56
		10	2558	1				.17
		10	2583	2				1.08
		10	2583	2				1.50
		10	2583	2				.60
		10	2583	2				1.54
		10	2741	1	3350	Paving Garrison Avenue	February 25, 1909	3,031.89
		10	2741	66				1,816.49

[fol. 13]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2730	101	3384	Opening Garrison Avenue	June 19, 1909	16.93
		10	2741	66				1.00
		10	2755	133				.33
		10	2755	133				1.00
		10	2583	2	3427	Opening East 136th Street	November 26, 1909	30.78
		15	4023	27	3455	Regulating Taylor Street	December 31, 1909	80.09
		15	4024	29				110.23
		10	2734	30	3458	Sewer Garrison Avenue	January 13, 1910	4,712.97
		10	2730	101	3469	Opening Spofford Avenue	February 7, 1910	0.95
		10	2604	74				9.21
		10	2741	1	3535	Regulating Faile Street	July 20, 1910	79.52
		10	2741	66				34.54
		10	2733	55	3577	Paving Whitlock Avenue	November 22, 1910	26.00
		10	2741	66	3585	Regulating Bryant Avenue	December 2, 1910	578.23

[fol. 14]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	10	2733	55	3586	Regulating Garrison Avenue	December 2, 1910	66.71
		10	2734	30				3,582.66
		10	2730	28	3639	Opening Garrison Avenue	March 14, 1911	1.00
		10	2730	28				4,230.00
		10	2730	28				4,230.00
		10	2730	101				9,269.00
		10	2730	101				1.00
		10	2730	101				1.00
		10	2730	28				386.00
		10	2731	5				1.00
		10	2731	61				1.00
		10	2604	72				1.00
		10	2604	74				452.14
		10	2604	74				126.48
		10	2604	74	3723	Sewer Truxton Street	December 8, 1911	731.25
		10	2604	74				33.97
		10	2604	74				433.35
		10	2604	74				237.93
		10	2730	28				25,492.50
		10	2730	101				1,899.00
		10	2730	101				1,026.00
		10	2731	5				4.50
		10	2731	61				257.80
		10	2733	55				561.60
		10	2734	30				531.00
		10	2599	200				838.93
		10	2599	295				1,150.33
								252.00

[fol. 15]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered		Outstanding Principal Amount
70605	A-88	10	2599	298	3723	Sewer Truxton Street	December 8, 1911		297.00
		10	2604	72					1,311.75
		10	2604	72					244.85
		10	2604	74					5.40
		10	2604	251					103.50
		10	2604	295					27.00
		10	2730	28					261.00
		10	2730	28					63.00
		10	2730	101	3727	Paving Longwood Avenue	December 22, 1911		1,261.10
		10	2730	101					121.88
		10	2731	5					92.40
		10	2586	20	3766	Paving East 135th Street	March 15, 1912		557.90
		10	2587	22					602.06
		10	2730	28	3877	Regulating Leggett Avenue	December 20, 1912	1	3.29
							December 20, 1913	2	4.73
							December 20, 1914	3	4.60
							December 20, 1915	4	4.43
							December 20, 1916	5	4.26
							December 20, 1917	6	4.10
							December 20, 1918	7	3.94
							December 20, 1919	8	3.77
							December 20, 1920	9	3.61
							December 20, 1921	10	3.44

[fol. 16]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered		Outstanding Principal Amount
70605	A-88	10	2730	28	3877	Regulating Leggett Avenue	December 20, 1916	5	$ 10.33
							December 20, 1917	6	9.94
							December 20, 1918	7	9.53
							December 20, 1919	8	9.13
							December 20, 1920	9	8.73
							December 20, 1921	10	8.34
		10	2741	1	3950	Regulating Garrison Avenue	June 6, 1913		201.40
		15	4025	27	3974	Regulating White Plains Road	October 10, 1913		1,999.55
		15	4041	5/1					181.06
		10	2604	74	5009	Regulating East 149th Street	June 16, 1914		40.00
		9	2277	20	5114	Opening East 161st Street	July 12, 1915		1.00
		10	2604	74					2.84
		10	2730	101	5145	Opening East 156th Street	December 10, 1915		4.03
		15	3904	1	5246	Regulating Tremont Avenue	December 15, 1916		17,891.00
		10	2759	388	5319	Opening Ludlow Avenue	December 27, 1917		1.00
		10	2759	388					333.28

[fol. 17]

EXHIBIT A

Lien Number	Identification Number	Section	Block	Lot	Assessment Number	Title of Improvement	Date Entered	Outstanding Principal Amount
70605	A-88	15	4042	1	5445	Opening Cruger Avenue	April 27, 1920	3,042.44
		15	4018	22	5500	Acquiring Title Adams Street	June 3, 1921	289.12
		15	4022	26				1.00
		15	4022	26				160.12
		15	4022	26				1.00
		15	4023	27				1.00
		15	4023	27				1.00
		15	4042	1	5505	Opening Cruger Avenue	July 28, 1921	192.10
		15	4018	22	5507	Acquiring Title Kinsella Street	September 23, 1921	0.26
		10	2730	28	5559	Regulating East 149th Street	June 29, 1922	139.00
		10	2730	101				90.00
		10	2604	74				3,879.00
		10	2604	74				880.00
		17	5064	1	5597	Regulating Bronx Boulevard	April 3, 1923	40.00
		17	5131	1	6376	Sewer East 177th Street	January 15, 1930	120.00
							Grand Total	$134,153.94

[fol. 18] IN UNITED STATES DISTRICT COURT

REVISED ORDER OF NOTICE—November 6, 1950

It having been called to the attention of the Court that under General Order in Bankruptcy No. 49 (11) all process to be served outside of the District in which proceedings under Section 77 are pending shall be directed to and served by the United States Marshal for the District in which service is to be effected, it is Ordered:

(1) That the petition of The New York, New Haven and Hartford Railroad Company, dated November 2, 1950 and filed herein on that date, relating to special assessments laid upon certain real property of that Company in the City of New York for local improvements, is hereby set down for hearing in this Court at two o'clock in the afternoon, E.S.T., or as soon thereafter as the Court can hear the same, on the 20th day of November, 1950, at New Haven, Connecticut, and

(2) That the Clerk of this Court is hereby directed to immediately transmit three copies of this order and of said petition to the United States Marshal for the Southern District of New York, who, pursuant to the General Orders in Bankruptcy, is directed to serve the same upon the Comptroller of the City of New York and upon the Corporation Counsel of that City.

(3) That the Order of Notice entered herein November 2, 1950, is hereby rescinded.

Enter:

C. C. Hincks, District Judge.

Dated: November 6, 1950.

[fol. 19] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF GEORGE H. WEBSTER, IN SUPPORT OF PETITION

STATE OF CONNECTICUT,
County of New Haven, ss.:

GEORGE H. WEBSTER, being duly sworn, deposes and says:

1. I am Tax Agent of The New York, New Haven and Hartford Railroad Company, petitioner herein, and I am familiar with the subject matter of the petition herein.

2. This affidavit is based principally on records, files, and papers in the possession of petitioner.

3. This affidavit is made in support of said petition and in answer to the affidavit of Meyer Scheps, sworn to on December 14, 1950, submitted in opposition to said petition, but no attempt is here made to answer the arguments, opinions and conclusions contained in said affidavit.

4. With respect to the matters referred to in paragraphs 9 and 10 of said affidavit by Meyer Scheps, I am advised by counsel that under the law of the State of New York assessments which are void as a matter of law are void, invalid, and unenforcible even though the usual procedures for reviewing their validity are never undertaken, and that it has always been and is the claim of petitioner and petitioner's trustees that the assesments set forth in Ex-
[fol. 20] hibit A attached to the petition herein were and are void as a matter of law.

5. With respect to the matters referred to in paragraph 21 of said affidavit of Meyer Scheps, it does not appear in any of the papers on file in the reorganization proceedings prior to the present petition that the liens of the City of New York were ever brought to the attention of the reorganization court, that said court ever passed on their validity or that said court had any knowledge of their existence; furthermore, the deed executed by petitioner's trustees to petitioner nowhere specifically refers to said liens and transfers all real property held by petitioner's trustees from them to petitioner "free and clear of all claims, rights, demands, interests, liens, encumbrances of creditors or other obligees * * * of the Trustees or their predecessors * * * except the obligations imposed * * * by

the Consummation Order or assumed * * * pursuant to the Consummation Order * * *."

6. The assessments referred to in paragraphs 26, 27 and 28 of said affidavit of Meyer Scheps were paid by petitioner's trustees not because they were valid but solely because the City of New York refused to pay to them money due them as the sole proceeds from property sold (in lieu of condemnation) to the City of New York for widening Whitlock Avenue, unless said assessments were first paid. Before paying said assessments, petitioner's trustees obtained from the City of New York an apportionment of the previous outstanding unpaid assessments, which covered the property being sold and other property adjacent thereto belonging to said trustees. No payment of or offer to pay the assessments remaining unpaid on said adjacent property after said apportionment was ever made by said trustees or petitioner.

[fol. 21] 7. The assessment referred to in paragraph 29 of said affidavit of Meyer Scheps was not paid by petitioner or its trustees. The City of New York itself paid this assessment by way of set-off in order to make collectible by it an award made in 1911 to petitioner for the taking of petitioner's property for Taylor Avenue but never collected by petitioner.

8. The assessment referred to in paragraph 33 of said affidavit of Meyer Scheps was paid by petitioner's trustees not because it was valid but solely because the City of New York refused to pay to them money due them as the sole proceeds from property sold (in lieu of condemnation) to the City of New York for a new parkway (the Bronx River Parkway Extension), unless said assessment was first paid, but by compromise agreement with the City Collector of the City of New York, the assessment was paid off by paying only one third of the principal amount due plus interest to May 15, 1940, in recognition of petitioner's claim that the assessment was invalid.

9. The assessments, taxes and water charges referred to in paragraphs 26 through 30 and 33 of said affidavit of Meyer Scheps were all paid by petitioner's trustees without any representation or promise being made then or at any other time by any authorized person to the City of New

York that any other assessments, taxes or water charges would also be paid or that petitioner, its trustees or their counsel considered any of said paid or unpaid assessments, taxes and water charges proper or valid, and said payments were made without reference to or consideration of any proposed or completed plan of reorganization and at a time before petitioner's reorganization was completed when it was not yet too late for the City of New York to petition the reorganization court for leave to file a late claim in said reorganization proceedings.

10. The statement of the debtor's assets and liabilities as of the close of business on October 23, 1935 filed with [fol. 22] the reorganization court on December 5, 1935 and similar succeeding statements through December 31, 1940, referred to in paragraphs 36, 37 and 38 of said affidavit of Meyer Scheps, each contained a schedule setting forth current tax liabilities but did not include pre-bankruptcy tax liabilities incurred before 1935. Such schedules after December 31, 1940 were similarly compiled and filed, but were thereafter placed under Item 767 instead of Item 771. These schedules never have contained any amounts for assessment liens of the City of New York.

11. The City of New York, through its Corporation Counsel and its City Collector, had actual notice of petitioner's being in reorganization under the bankruptcy laws by June of 1936 or earlier, but has never from October 23, 1935 to the time of its opposition to petitioner's present petition attempted to intervene in said reorganization proceedings, to file a claim therein, or to petition the court in charge of said proceedings for opportunity to file a claim therein or for any other relief.

12. The terms of Order No. 32 in the reorganization of petitioner, which provided in part that claims of creditors of petitioner were to be filed or evidenced by May 1, 1936 in order to participate in the reorganization, were promptly published in the Wall Street Journal in the City and State of New York once a week for two consecutive weeks, as directed by said order.

13. No instance has been found where petitioner or petitioner's trustees ever did or said or wrote anything which could reasonably lead the City of New York to

believe that its unpaid assessments were deemed valid, were all going to be paid, were provided for in the plan of reorganization, or need not be proved to the reorganization court like the disputed claims of other creditors.

George H. Webster.

(Sworn to on January 23, 1951.)

[fol. 23] IN UNITED STATES DISTRICT COURT

ANSWER OF THE CITY OF NEW YORK—December 12, 1950

The City of New York, appearing specially for the sole purpose of answering the Petition herein, of The New York, New Haven and Hartford Railroad Company, dated November 2, 1950, and for no other purpose, respectfully shows to this Court and alleges as follows:

First: Admits the allegations contained in Paragraphs 1, 2, 6 and 10 of the Petition herein.

Second: Admits the allegations of Paragraph 3 of the Petition herein except that it denies that any of the assessments set forth in Exhibit A of the Petition were or are void.

Third: Denies the allegations contained in Paragraph 4 of the Petition herein, except that it admits that none of the assessments set forth on Exhibit A attached to the Petition herein and made a part thereof, have been paid in full or in part, and that the City of New York claims and asserts and continues to claim and assert that such assessments constitute valid and enforceable claims protected by valid and enforceable liens upon the specific parcels of real property of the Petitioner against which they are imposed.

Fourth: Denies each and every allegation contained in Paragraph 5 of the Petition herein except that it admits [fol. 24] that it has refused and continues to refuse to cancel, discharge or remove any of the assessments contained in Exhibit A annexed to the Petition herein, and the liens thereof without receiving payment in full therefor,

and that the City of New York has at all times insisted on and still insists on enforcement of its assessment liens.

Fifth: Denies each and every allegation contained in Paragraphs 7, 8, 9 and 11 of the Petition herein.

As and for a first, separate and distinct defense:

Sixth: That none of the proceedings in reorganization had herein on and after October 23, 1935, including the Plan of Reorganization and the Final Decree herein, materially and adversely affected, nor were they intended to materially and adversely affect, the assessment liens of the respondent, the City of New York.

Seventh: That the Plan of Reorganization certified by the Interstate Commerce Commission and approved by this Court and the Consummation Order and Final Decree of this Court reserved the assessments set forth in Exhibit A annexed to the Petition herein, in favor of the City of New York and directed the reorganized company to pay or assume such assessments.

As and for a second, separate and distinct defense:

Eighth: That at no time since October 23, 1935, the date of the commencement of the proceedings to reorganize the Petitioner herein, did this Court acquire or exercise jurisdiction over the subject matter set forth in the Petition [fol. 25] herein or over the assessment liens of the City of New York or over the person of the City of New York.

As and for a third, separate and distinct defense:

Ninth: That throughout the course of the Reorganization Proceedings herein the Debtor, its Trustees or their counsel on numerous occasions negotiated with the respondent, The City of New York, with respect to taxes, assessments and water charges which had become liens on the real property of the Debtor prior to inception of such proceedings.

Tenth: That at all times in their negotiations as aforesaid, the Debtor, its Trustees and counsel treated the assessments of the respondent as valid, subsisting and prior liens which were not affected by the Reorganization Proceedings.

Eleventh: That by reason of their conduct, as aforesaid,

the petitioner is now equitably estopped and barred from seeking the relief demanded in its Petition herein.

Wherefore, the Respondent City of New York respectfully prays as follows:

1. That the Petition herein be dismissed for want of jurisdiction in this Court, or, in the alternative:

2(a). That this Court construe the Plan of Reorganization and the Consummation Order and Final Decree as restoring to the City of New York its rights to enforce its assessment liens and requiring the payment or assumption by the Petitioner of all of the assessments set forth in Exhibit A attached to the Petition herein, and

[fol. 26] 2(b). That an order be entered herein dismissing the Petition, and

3. That the Respondent, City of New York, be granted such other and further relief as may be justified in the premises.

The City of New York, By John P. McGrath, Corporation Counsel.

Dated: December 12, 1950.

(Verified on December 12, 1950)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MEYER SCHEPS, SWORN TO ON DECEMBER 14, 1950, IN OPPOSITION TO PETITION

STATE OF NEW YORK,
County of New York, ss.:

MEYER SCHEPS, being duly sworn, deposes and says:

1. I am an Associate Assistant Corporation Counsel of the City of New York, fully familiar with all of the matters hereinafter set forth. The counsel for the respondent, pursuant to the Laws of the State of New York and the New York City Charter, is John P. McGrath, Corporation Counsel of the City of New York.

[fol. 27] 2. All of the matters hereinafter set forth which relate to proceedings in reorganization of the Debtor herein were obtained by your deponent from an examination of the records in the office of the Clerk of this Court, since the entry of the Consummation Order and Final Decree herein. This affidavit, however, and the facts related herein do not presume to exhaust the entire record of the proceedings for reorganization of the Debtor. The magnitude of the record precluded a complete and thorough study thereof by your deponent within the period of his investigation. Nevertheless, your deponent is of the opinion that he has uncovered evidence of the lack of intent to affect the City's liens by the reorganization proceedings which is sufficient to warrant the denial of the present application. However, there may be additional facts and circumstances which may be culled from the record which will further support and corroborate the City's position. Permission is therefore sought of this Court to refer to such additional material as counsel for respondent may be able to uncover before the date of the hearing herein not included in this affidavit. Deponent further requests that the entire record be deemed a part of the present application so that the record on this application shall be full and complete for all purposes.

3. This affidavit is made in opposition to a petition herein of The New York, New Haven and Hartford Railroad Company which seeks an order (a) for instructions pursuant to the Consummation Order and Final Decree herein, (b) directing that the real property of said Petitioner subject to the assessments set forth in Exhibit A annexed to its petition be declared free and clear thereof and of all liens therefor, (c) that the City of New York be restrained, enjoined and barred from enforcing said assessments or their liens, and (d) that the said City be directed and ordered to [fol. 28] cancel, discharge and remove of record all of the said assessments.

4. The City of New York is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

5. The City of New York has a plan of government which is set forth in the New York City Charter (William's Press) 1943, adopted by referendum November 3, 1936, in effect

January 1, 1938. To carry out the provisions of this Charter, the Legislature of the State of New York provided an Administrative Code of the City of New York (Laws of New York, 1937, Chap. 929).

6. Prior to the enactment of the New York City Charter, the plan of government of the City of New York was contained in the Greater New York Charter (Laws of New York, 1897, Chap. 378, as revised by Laws 1901, Chap. 466), and in earlier charters enacted by the Legislature of the State of New York.

7. Each and every one of the assessments set forth in Exhibit A attached to the petition herein, was levied pursuant to and in conformity with the applicable provisions of the charter of the City of New York in effect at the time of the levy. Each and every one of the said assessments became specific liens upon the respective parcels of property listed in said Exhibit ten days after their several dates of entry set forth in the column "Date Entered" appearing on the said Exhibit A. The principal amount of these liens is the sum of $134,153.94. Interest thereupon computed at the legal rate of 7% per annum to December 31, 1950 is $369,653.92. The total of principal and interest due on said liens is $503,807.86 as of December 31, 1950.

[fol. 29] 8. Each and every one of the liens referred to was perfected in the manner prescribed by law prior to October 23, 1935, the date on which the New York, New Haven and Hartford Railroad Company petitioned this Court for an order permitting its reorganization under the provisions of § 77 of the Bankruptcy Act.

9. The several charters under which the City of New York operated at the time of the assessment of each of the individual assessments in question provided complete and adequate methods of making objection thereto and a complete, thorough and adequate method of review of the determination of any board of assessors or court of record. The New York, New Haven and Hartford Railroad Company, however, failed and neglected to make any objection to the determination of the appropirate board of assessors or court of record, or if such objection was in any instance made, the Railroad Company either failed or neglected to pursue the remedy of judicial review provided in the ap-

propriate city charter or failed to sustain its objections in any judicial review.

10. The time in which such objections could be made or judicial review obtained expired, with respect to each and every one of the assessments contained in Exhibit A attached to the petition, long before October 23, 1935, the date of the commencement of the proceedings to reorganize the New York, New Haven and Hartford Railroad Company. In fact, the last assessment in point of time prior to October 23, 1935, contained in Exhibit A attached to the petition herein, was entered on January 15, 1930, and became a lien on January 25, 1930. With respect to this assessment, the Greater New York Charter, § 963, then in effect, provided that proceedings to vacate or reduce assessments in the City of New York were to be brought within one year [fol. 30] after confirmation thereof. § 950 of the same charter set forth the procedure under which objections could be made to the assessment and directed the Board of Assessors, after confirming the assessment, to transmit it to the Comptroller for entry.

11. The assessments for benefit set forth in Exhibit A, all of which were levied prior to October 23, 1935, and the liens thereof, constitute and at all times did constitute specific liens against the respective parcels of real property designated by block and lot numbers on the Tax Map of the City of New York, and were enforceable exclusively as such liens but without any personal liability attaching to the owner of any such affected parcel of real property.

12. Further, these specific liens, from the moment of their attachment to the individual parcels of real property affected thereby, under the laws of the State of New York and the several city charters above referred to, became first, prior and paramount liens against such specific parcels of real property. These liens did not constitute either personal obligations of the owner of the specific property affected or did they attach as liens to any or all other properties of the specific owner.

13. The remainder of this affidavit will be devoted to a demonstration of three points: (1) that the proceedings before this Court and the Interstate Commerce Commission show that the reorganization was never intended to affect

the assessment liens of the City of New York; (2) that the course of conduct of the Debtor and the Trustees was such as to clearly indicate that the assessment liens of the City of New York were not to be affected by the reorganization proceeding—indeed, this course of conduct estops the reorganized company from now claiming that the assessment [fol. 31] liens were intended to be included within the Plan of Reorganization; and (3) that the assessment liens of the City of New York are not barred by Order No. 32 in which the time for filing claims was fixed by this Court.

I

14. On October 23, 1935, the date when the New York, New Haven and Hartford Railroad Company petitioned this Court for reorganization under § 77 of the Bankruptcy Laws of the United States, each of the specific parcels of real property set forth in Exhibit A of the petition herein and individually described by block and lot number therein, was subject to a prior and paramount lien in rem in favor of the City of New York. Therefore, when by Order No. 1 in this reorganization proceeding this Court took jurisdiction over the property of the Debtor, that jurisdiction was subject to the aforesaid liens in favor of the City of New York. Specifically, Order No. 1 aforesaid provided in Paragraph (3) thereof:

> "That the Debtor is authorized in its discretion, from time to time until further order of this Court, out of funds now or hereafter coming into its hands, to pay:
>
> "(a) All taxes and assessments due or to become due upon the properties, income, franchises or business of the Debtor; * * *"

15. The Debtor and its Trustees were therefore specifically charged with the duty to make payment of these assessments. The order of this Court explicitly recognized that taxes and assessments due at the time of the filing of the Petition in Reorganization were not to be affected by the proceedings, unless by further order of the Court payment was affirmatively enjoined.

[fol. 32] 16. Order No. 1 provided (Paragraph 10) that notice of the hearing for the appointment of trustees was to

be given by publication directed to creditors and stockholders and by mailing copies of the said order to the Debtor's mortgage trustees. Thus, notice was directed to be brought home to the mortgage trustees who, but for the existence of tax liens, would be the highest group of lien creditors. It seems clear that had the most preferred group, i. e., tax lienors, been intended to be affected by the reorganization proceedings, notice would have been directed to be given to them by mail as well.

17. Likewise, Order No. 32, dated January 4, 1936, provided (Paragraph 5) for the same form of mailed notice to mortgage trustees. Publication was directed as against other creditors. Since this was the order which fixed the time for filing of claims, it is apparent that had it been intended that the City would be required to file claims, notice would have been required to be mailed to it.

18. The entire course of the reorganization proceeding from that point on clearly indicates that there was never any intention to disaffirm the assessments levied by the City of New York or to alter, modify or satisfy them. Furthermore, the first report of the Interstate Commerce Commission approving the original Plan of Reorganization specifically provided for the payment of or assumption by the reorganized company of liens prior in rank to the lien of the first mortgages (Record, p. 7980). Thereafter, the Plan, both as originally proposed and modified, always considered tax liens as outside its scope. If further proof is needed that this was always the intent, it is significant that when the City of Boston questioned whether or not the Plan of Reorganization might materially or adversely affect the security of its lien, this Court pointed out that [fol. 33] the Plan of Reorganization as finally adopted and confirmed specifically provided "that nothing herein shall be construed as impairing or disturbing any present or future lien for taxes against any property." (Plan of Reorganization, Paragraphs N[4][d]; Paragraph O[2][4]). In addition, the Plan of Reorganization as originally promulgated and approved provided at Paragraph L as follows:

> "Claims against the principal debtor and secondary debtors, other than Old Colony, entitled to priority

over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, shall be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of such debtors. * * *"

19. The first report of the Interstate Commerce Commission certifying the Plan of Reorganization stated (Record, p. 7980):

> "The plan should also provide for the satisfaction of (a) current liabilities of the principal debtor incurred in the ordinary conduct of its business prior to the institution of the reorganization proceeding which are entitled to priority over any mortgages of the principal debtor, * * *"

After providing that such claims to the extent unpaid should be assumed or paid by the reorganization company, the Interstate Commerce Commission's report concluded by finding that "such claims against the principal debtor, when so treated, are not materially and adversely affected by the plan." The language quoted from Paragraph L of [fol. 34] the Plan of Reorganization was contained in the Plan as originally submitted and remained therein throughout all of its subsequent modifications. That was the Plan which was finally confirmed by this Court.

20. It is therefore clear that in dealing with tax liens of the various municipalities in which the Debtor owned and held properties, it was never intended to affect, alter, modify or satisfy the assessment liens of the City of New York. On the contrary, it affirmatively appears that it was intended that such liens should remain intact and in full force and effect.

21. Nowhere in any of the papers on file in this proceeding is there any indication that the liens of the City of New York were considered other than as being materially or adversely affected by the Plan. Indeed, the contrary appears in the deed of all of the Debtor's property, executed by Howard S. Palmer, James Lee Loomis and Henry

B. Sawyer, as Trustees of the Debtor, as grantors, to New York, New Haven and Hartford Railroad Company, as grantee. This conveyance, dated September 18, 1947 and recorded in the office of the New York City Register in the County of Bronx on October 17, 1947, in Liber 1567 of Conveyances at page 492, was executed in compliance with the Consummation Order and Final Decree of this Court. Significantly, this deed provided that the conveyance of the properties was "subject also, in so far as the property by this Indenture remised, released, transferred, assigned, conveyed, quitclaimed and set over may be subject to the liens of taxes and assessments lawfully levied or assessed against the same, to any and all such liens." Here again, at the very consummation of the whole proceeding appears clear evidence that from beginning to end the Debtor and its Trustees, with the *express* approval of this Court, con- [fol. 35] sidered that the assessment liens of the City were to remain valid and subsisting liens against each of the specific properties affected thereby in the hands of the reorganized company. This deed, both in form and substance, was approved specifically by this Court in Order No. 1007, the Consummation Order and Final Decree, in Part III, Paragraph 1, Subdivision 12. The provision of the order which approved this instrument, among others, is as follows (Record, pp. 13256-7):

"III

"Approval of Documents and of Fiduciaries and Agents under the Plan

1. *Approval of Documents.* The form and substance of each of the following documents, as filed and deposited by the Committee with the Clerk of this Court in connection with its petition for the entry of this order, together with the changes therein, approved by the Court at the hearing upon said petition, *are approved and found and adjudged to be in all respects in accord with the true intent and requirements of the Plan and necessary and proper to carry it into effect:*

" * * *

"(12) Form of Deed from Howard S. Palmer, James Lee Loomis and Henry B. Sawyer as Trus-

tees in bankruptcy of the properties of the Debtor and the Secondary Debtors to The New York, New Haven and Hartford Railroad Company (the Reorganized Company).

"* * *" (Emphasis supplied.)

The substance of this deed provided, among other things, that the reorganized company took title to the property [fol. 36] subject to *all* tax and assessment liens. In approving this deed both as to form and substance this Court necessarily found that it carried out the true intent of the Plan of Reorganization. This intent is conclusively shown to be what we have urged, namely, that the assessment liens of the City of New York were never intended to be affected by the reorganization proceedings.

22. It therefore follows since the assessment liens of the City of New York were never intended to be affected by the reorganization proceedings that there is nothing in the Plan of Reorganization left to construe. Therefore, this Court has no jurisdiction to entertain the present application.

II

23. The entire course of conduct of the Debtor and its Trustees in reorganization was such, and until only recently continued to be such, as to clearly indicate that the assessment liens of the City were not in question. In fact, the conduct of the Debtor and its Trustees indicates that their construction of the reorganization plan was always the same as that heretofore advanced in this affidavit under Subdivision I. Furthermore, the entire course of dealing throughout the reorganization proceedings was such that the City of New York had every right to believe that its liens were being fully and adequately protected and that they would either be paid in full or would continue as liens after the reorganization proceedings had been consummated. Indeed, the entire course of conduct of the Debtor and its Trustees in this proceeding was such as to lull the City into a sense of security in the sanctity of its liens, and resultantly, that course of conduct estops the Railroad from now asserting that the liens were barred in the reorganization proceedings.

[fol. 37] 24. This course of conduct by the Debtor and its Trustees falls roughly into three categories: (a) the payment during reorganization of various assessments due to the City of New York which had accrued and become liens prior to the filing of the petition for reorganization; (b) the compromise during the reorganization proceedings by the Trustees of an assessment which had become a lien prior to the reorganization; and (c) the Debtor's treatment of all tax liabilities as indicated from its financial statement as of October 23, 1935, and the monthly statements filed in this proceeding thereafter.

25. Numerous New York City assessments for local improvements other than those which are in issue accrued and became liens on various properties of the New York, New Haven and Hartford Railroad Company, prior to October 23, 1935. The nature of these assessments was in many cases identical with those in issue and in other cases extremely similar. Yet it can and will be demonstrated that the Railroad paid such assessments in full during the reorganization proceeding.

26. For example, Assessment No. 3639, entered on March 14, 1911, in a proceeding for the opening of Garrison Avenue, contained an item of $8.34 which became a lien against premises Block 2731, Lot 5½ of 5. In the very same proceeding assessments for various sums were entered as liens against a number of Railroad properties on Blocks 2730, 2731, and 2604, all more fully shown on page 8 of Exhibit A annexed to the petition herein. The item which became a lien against Block 2731, Lot 5½ of 5, was paid on May 23, 1936, *subsequent to the time of the filing of the petition in reorganization.*

27. Assessment No. 3723, entered on December 8, 1911, in a proceeding for sewers in Truxton Street, contained [fol. 38] an item of $70.15 which became a lien against premises Block 2731, Lot 5½ of 5. In the very same proceeding, assessments for various sums were entered as liens against a number of Railroad properties on Blocks 2604, 2730, 2731, 2733, 2734 and 2599, all more fully shown on pages 8 and 9 of Exhibit A annexed to the petition herein. The item which became a lien against Block 2731, Lot 5½ of 5, was paid on May 23, 1936, *subsequent to the time of the filing of the petition in reorganization.*

28. Assessment No. 3727, entered on December 22, 1911, in a proceeding for paving Longwood Avenue, contained an item of $80.64 which became a lien against premises Block 2731, Lot 5½ of 5. In the very same proceedings, assessments for various sums were entered as liens against a number of Railroad properties on Blocks 2730 and 2731, all more fully shown on page 9 of Exhibit A annexed to the petition herein. The item which became a lien against Block 2731, Lot 5½ of 5 was paid on May 23, 1936, *subsequent to the date of the filing of the petition in reorganization.*

29. Assessment No. 3455, entered on December 31, 1909, in a proceeding for regulating Taylor Street, contained an item of $62.34 which became a lien against premises Block 4023, Lot 27. In the very same proceeding, assessments for various sums were entered as liens against a number of Railroad properties on Blocks 4023 and 4024, all more fully shown on page 7 of Exhibit A annexed to the petition herein. The item which became a lien against Block 4023, Lot 27, was paid on January 21, 1942, *subsequent to the date of the filing of the petition in reorganization.*

30. In addition to the specific items discussed above, there are numerous other items of benefit assessments, [fol. 39] real estate taxes, old school taxes and water charges which had become liens against specific parcels of the Debtor prior to the date of the reorganization and were paid after the Railroad went into reorganization.

31. Whatever reasons the Trustees may have had for paying the aforesaid items and not paying the items which form the basis of the present petition, the fact nevertheless remains that the paid items fall into the same category as the items which are still open. The payment of these items is proof of the practical construction of the Plan of Reorganization. Obviously, if it was intended that the Plan cover all accrued tax liens, the Trustees were derelict in their duty in paying any of these items. It must be inferred that such dereliction did not occur.

32. Furthermore, even if it could possibly be construed that accrued tax liens were contained within the Plan of Reorganization, the Trustees' conduct in paying some of

the items of this class created an estoppel against them in favor of the City of New York, as will more fully be discussed under Subdivision III, *post*.

b

33. On December 15, 1916, Assessment No. 5246 in a proceeding for regulating Tremont Avenue was entered against Block 3910, Lot 1, in the sum of $7,630. In the very same proceeding, an assessment in the sum of $17,891 was entered as a lien against other premises owned by the Railroad in Block 3904, Lot 1, as is more fully shown on page 10 of Exhibit A annexed to the petition herein. The lien against Block 3910, Lot 1, at the time the Debtor went into reorganization, was unpaid. By Order No. 238 of this Court, dated December 7, 1937, the Trustees were authorized to sell this parcel, among others, to the City [fol. 40] of New York in lieu of condemnation for park purposes. No mention of taxes or their payment was made in that order. When the time came for payment of the consideration, the City of New York maintained a right to set off against it the aforesaid unpaid assessment which was a lien on the property. Negotiations were entered into between counsel for the Trustees and the City of New York, which finally resulted in the payment of a sum of money in settlement and cancellation of this assessment sometime in September, 1940. From these facts it may again be inferred that the assessment liens of the City of New York were practically construed by the Trustees as being outside the Plan of Reorganization. Furthermore, at no time during the course of the negotiations was it ever contended by the Trustees or their counsel that this particular assessment lien was barred by the failure to comply with Order No. 32 of this Court. Again, if this assessment lien was included in the Plan of Reorganization, the Trustees were derelict in effecting a compromise. Such dereliction should not be presumed if a reasonable explanation otherwise exists.

34. Lastly, aside from questions of dereliction of duty or construction of the Plan of Reorganization, it is contended by the City of New York that the course of conduct of the Trustees and their counsel led it to believe that its

assessments and taxes would not be affected by the Plan of Reorganization. The City relied upon the Trustees' course of conduct. The Trustees and the reorganized company should now be estopped from maintaining to the detriment of the City of New York any position other than that which they maintained in their prior negotiations with the City of New York during the reorganization proceedings.

c

35. This Court, by Order No. 1 (Paragraph 7), dated October 23, 1935, made pursuant to § 77(c)(4) of the Bank-
[fol. 41] ruptcy Act, required the Debtor to "file with the Clerk of this Court a statement of the assets and liabilities of the Debtor as of the close of business on October 23, 1935, and, within forty-five days after the close of each calendar month thereafter, * * * a statement of the assets and liabilities of the Debtor as of the close of business on the last day of the second preceding calendar month, together with a summary statement of the revenues and expenses of the Debtor for the second preceding calendar month."

36. A statement was filed by the Debtor on December 5, 1935 showing its assets and liabilities as of the close of business on October 23, 1935. Under "Liabilities" there appeared a sub-head entitled "Unadjusted Credits." Under this sub-head there appeared a subdivision as follows: "771—Tax Liability $2,024,931.12."

37. Thereafter, the Debtor or the Trustees filed monthly statements as required by the aforesaid order of the Court. In each of such statements, up to and including the one filed to indicate the financial status of the Railroad on December 31, 1940, Item 771—Tax Liability—was carried. The report showing the status on December 31, 1940 showed the tax liability as $4,881,272.55. However, the report showing the condition of the Debtor on January 31, 1941, *the ensuing month*, contained no mention of Item 771 or tax liability. Furthermore, none of the ensuing reports until the entry of the consummation and final decree herein contained Item 771 or an account for tax liability.

38. It is quite apparent that from the very outset of the reorganization proceedings the Debtor, and thereafter its Trustees, considered taxes accrued prior to the reorgan-

ization as an item which would have to be fully met by them. The only conclusion that can be drawn from the [fol. 42] disappearance of Item 771—Tax Liability—from the monthly balance reports is that all such taxes had been fully paid. As a matter of fact, I have been informed that the assessment liens of the City of New York were not included in the original listing of tax liabilities contained in Item 771 of the first monthly statement. Obviously, these liens were not intended to be affected by any future course of conduct. The significance of these facts as indicating the practical construction placed upon the Plan of Reorganization by the Debtor and its Trustees cannot be stressed too strongly.

39. The only reasonable conclusion which may be drawn from the facts outlined in this Subdivision II is that the Trustees, in the conduct of the business of the Debtor during reorganization, did in fact consider the assessment liens and other tax liens due to the City which had accrued prior to the institution of the proceedings as valid and binding liens which they were under a duty to pay. This actual treatment of these liens is in accord with our contention in Subdivision I that they fell into a class not materially or adversely affected by the Plan and is consistent with no other interpretation of the Plan. Indeed, if the proceedings had hereunder, the Plan of Reorganization and the reports of the Interstate Commerce Commission may be considered as being ambiguous in this respect, their practical construction by the Trustees in the conduct of the business of the Debtor must resolve this ambiguity in favor of the City of New York.

III

40. We have reserved for last the contention raised in Paragraph 8 of the petition that "The City of New York, although it had timely notice of the reorganization proceedings * * * has at all times knowingly and intentionally [fol. 43] refused to file or evidence a claim or claims in said proceedings for any or all of the outstanding, unpaid assessments for local improvements in its favor upon the real property of your petitioner, including those set forth in said Exhibit A, even though by the terms of Order No. 32, dated January 4, 1936, this Court directed that claims of

creditors of your petitioner must be filed or evidenced by May 1, 1936 in order to participate in its reorganization, and no such claim or claims has been filed or evidenced in said proceedings in behalf of the City of New York by any one else.''.

41. As we have conclusively demonstrated in Subdivisions I and II above, the assessment liens in question were never intended to be affected by the reorganization of the Debtor Railroad. There never was any occasion for the participation by the City of New York in the reorganization. In consequence, Order No. 32 was not directed nor intended to be directed to the City of New York. Notice of the contents of Order No. 32 was to be given by publication in certain specified newspapers directed to creditors, *and by mailing* copies of the order to the mortgage trustees or their counsel. In view of the fact that the City's assessment liens are prior and paramount in lien to those of any mortgagee, and the further fact that the Court deemed it necessary to bring home notice personally to such mortgagees (who but for the City's prior lien constituted the highest liens on the Debtor's property), it must be assumed that the Court never intended by that order that the City of New York file a claim for its assessment liens or be thereafter forever barred.

42. Even if it could possibly be maintained that the assessment liens of the City of New York were intended to be affected by the reorganization proceeding, Order No. 32 did not legally and effectively bar them, because it was not [fol. 44] specifically directed to the City of New York nor was it ever personally served upon the City of New York. Hence, Order No. 32 did not confer on the Court jurisdiction to deal with the City's liens. In our memorandum of law to be submitted upon the hearing of this petition, we will discuss the jurisdiction of this Court over tax liens and demonstrate beyond cavil that the judicial power to deal with them is limited in several very material respects. The cases are clear that the attempt to exercise such jurisdiction must be accompanied either by specific notice of such attempt, under mandate of the Court, directed to the taxing authority involved or by its voluntary submission to the jurisdiction of the Court. Neither of these events occurred in this proceeding. The City of New York maintains that

it had a right to rely upon the sovereign, paramount and prior nature of its liens and that these liens remain today in full force and effect. Any other construction would be an unauthorized and illegal invasion of States' rights and clearly unconstitutional.

43. Finally, assuming *arguendo* that the failure of the City of New York to comply with the provisions of Order No. 32 could bar the City of New York from asserting the validity of its tax liens, we maintain that the course of conduct of the Trustees and their counsel during the reorganization proceedings in their negotiations with the City of New York created an estoppel. This contention is strengthened by the fact that the consequences of the failure to comply with the provisions of Order No. 32 could have been effectively avoided *during* the reorganization proceeding by the application by the City of New York, by way of order for cause shown, for permission to file its claim as provided for in § 77(c)(7) of the Bankruptcy Act.

44. Never in any of their dealings with the City of New York did the Trustees or their counsel ever question the [fol. 45] priority of the City's liens or their status. During the course of the reorganization proceedings the City of New York billed the Debtor for current taxes as they became due. Each of these bills contained a column under which was set forth the word "Arrears." The use of the word "Arrears" on tax bills is provided under Administrative Code of the City of New York, § 415 (1)-10.0. Its effect is to put the recipient of the bill, in this case, the Debtor, on notice that taxes, assessments or water charges are in arrears and are due. Every such tax bill also gives notice that the presence of arrears may give rise to enforcement of the City's lien. The Debtor therefore had ample notice of the existence of these assessment liens and of the fact that the City of New York asserted and continued to assert their validity and enforceability. The burden was upon the Trustees if there was any question as to the validity of these assessment liens to put the matter in issue by affirmative action. As a matter of fact, this Court was never at any time asked to pass upon the validity of these liens prior to the consummation of the reorganization proceedings.

45. Never did the Trustees or their counsel indicate to

the City of New York that they considered the City's liens as being affected by the Plan of Reorganization. To the contrary, they affirmatively recognized the City's liens, whenever they had occasion to deal with them, as valid, subsisting and prior obligations which were not affected by the reorganization proceedings. This conduct lulled the City of New York into a belief that all its assessments would be similarly affirmed and either paid or assumed by the reorganized company. At this late date, the reorganization proceeding being completed and the property of the Debtor returned to it as reorganized, it is extremely doubtful whether this Court could entertain an application by order [fol. 46] to show cause for permission to file the City's claims for the assessments herein. We have reached this position in reliance upon the acts of the Trustees. The petitioner should not be allowed to benefit thereby.

Wherefore, deponent respectfully prays as follows:

1. That the petition herein be dismissed for want of jurisdiction in this Court, or, in the alternative,

2a. That this Court construe the Plan of Reorganization and the Consummation Order and Final Decree as requiring the payment or assumption of all of the assessments set forth in Exhibit A attached to the petition herein, and

2b. That an order be entered herein dismissing the petition, and

3. That the Respondent City of New York be granted such other and further relief as may be justified in the premises.

Meyer Scheps.

(Sworn to on December 14, 1950)

[fol. 47] In United States District Court

Order No. 32 Determining and Fixing the Time and Manner of Filing Claims—January 4, 1936

Pursuant to the mandatory provisions of subdivision (c), paragraph (7), of amendatory Section 77 of Chapter VIII of the Acts of Congress relating to Bankruptcy requiring

the Court to determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, and the manner in which such claims may be filed or evidenced and allowed, it is ordered:

1. That the 1st day of May, 1936 be, and it hereby is, fixed as the reasonable time within which the claims of creditors of The New York, New Haven and Hartford Railroad Company, Debtor, including claimants in tort whose claims accrued prior to October 23, 1935, may be filed or evidenced and after which no claim not so filed or evidenced may participate, provided, however, that claims arising out of the Debtor's rejection of a contract after April 1st, 1936, may be filed within thirty days after notice of such rejection is given.

2. That each claim shall be filed in duplicate with G. T. Carmichael, Comptroller of the Debtor, 71 Meadow Street, New Haven, Connecticut, who is hereby directed immedi-[fol. 48] ately to stamp the date of receipt thereon and acknowledge receipt of the same.

3. That each claim shall set forth the name and address of the claimant, the nature of the claim, dates of accrual and the amounts of the various items, with such details as shall definitely advise the Debtor of the particulars thereof and distinguish the claim from other claims of like nature, and shall state whether suit is pending on such claim, and if so, the name of the Court in which pending, also whether judgment has been recovered thereon, and shall describe any security for such claim, partial payments, offsets or counterclaims due the Debtor, and if any lien, priority, or preferential classification is claimed, the facts respecting the same shall be fully stated. The Debtor shall promptly examine each such claim, and if it finds the same correct and undisputed, it shall so advise the claimant; if any claim is undisputed in whole or in part, the Debtor shall promptly move in the premises by answer or otherwise and bring the same to the attention of the Court for hearing or reference.

4. That the trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the estate of the Debtor, or against any portion thereof, may, within the time

hereby prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf.

5. That the Debtor hereby is directed to give notice of the foregoing numbered paragraphs of this order to its creditors by promptly causing publication of a notice, containing said paragraphs and directed to such creditors, to [fol. 49] be made once during each week for two consecutive weeks in the New Haven Journal Courier and in the Hartford Courant, newspapers published in the State of Connecticut, and in the Boston Herald, a newspaper published in the State of Massachusetts, and in the Wall Street Journal, a newspaper published in the City of New York, State of New York, and in the Providence Journal, a newspaper published in the City of Providence, State of Rhode Island, and the Debtor is further directed to mail copies of this order to its mortgage trustees or their counsel and to such others as have entered their appearances herein.

When such publication and mailing have been completed, the Debtor shall file with the Clerk of this Court its report with respect thereto.

Enter:

Carroll C. Hincks, District Judge.

Dated: January 4th, 1936.

[fol. 50] IN UNITED STATES DISTRICT COURT

ORDER NO. 1 APPROVING PETITION—October 23, 1935

Upon due consideration of the petition of The New York, New Haven and Hartford Railroad Company, the above named Debtor, verified October 23, 1935, and filed herein this day, stating that such Debtor is unable to meet its debts as they mature and that it desires to effect a plan of reorganization in accordance with Section 77 of Chapter VIII of the acts of Congress relating to bankruptcy, and the

Court being satisfied that such petition complies with said section and has been filed in good faith, it is Ordered:

(1) That said petition be, and it hereby is approved as properly filed under Section 77 of Chapter VIII of the acts of Congress relating to bankruptcy.

(2) That the Debtor be, and it hereby is authorized and directed, pending further order of this Court, to run, manage, maintain, operate and keep in proper condition and repair the railroad and properties of the Debtor, wherever situated, whether in this state, judicial circuit, or elsewhere; to manage, operate and conduct its business, and to this end to exercise its authority, rights and franchises and to discharge its public duties; to employ or discharge and to fix the compensation of all its officers, counsel, attorneys, managers, superintendents, agents and employees; to collect and receive the income, rents, revenues, tolls, issues and profits, accrued or to accrue, from its railroad and properties; to collect all its outstanding accounts, and all dividends [fol. 51] and interest on securities belonging to it; to sell, convey, or lease property, real or personal, not needed in the operation of its railroad, and to exercise such rights of sale, conveyance, exchange and release as are reserved to, or available to it under its outstanding deeds of trust, mortgages, trust indentures, and similar instruments, and to use the proceeds of sale of released property as provided in such instruments, all in the same manner that it would be entitled to do in its own right; and, to the extent necessary to protect, preserve or benefit its railroad or properties or business, to make and pay for additions and betterments thereto and therof; all of the foregoing powers to be exercised by Debtor according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein.

(3) That the Debtor is authorized in its discretion, from time to time until further order of this Court, out of funds now or hereafter coming into its hands, to pay:

(a) All taxes and assessments due or to become due upon the properties, income, franchises or business of the Debtor;

(b) All necessary current expenses in operating the railroad, preserving the assets, and conducting the

business of the Debtor, including among other expenses the wages, salaries and compensation of all officers, attorneys, counsel, managers, superintendents, agents and employees retained by the Debtor; the payment of freight, ticket, switching, car mileage, per diem, switching reclaims, divisions, and all other interline accounts and balances; the adjustment, compromise or payment of claims for loss, damage or delay to freight, for overcharges and for reparation; the payment of joint facility and equipment rental and expenses, and the payment of accounts for materials and [fol. 52] supplies, also all sums now or which may hereafter become due to other persons or corporations for car or equipment repairs, or for the occupation or use, jointly or otherwise, of buildings, depots, terminals, tracks, side tracks, yards, warehouses, shops, bridges, interlocking plants and other railroad facilities, and such sums as may be necessary to comply with the obligations of the Debtor under contracts or leases by virtue of which such occupation or use may now or hereafter be enjoyed; but such payments shall not constitute affirmations of such contracts or leases, or any of them.

(c) Liabilities due and unpaid which were incurred by the Debtor within six months preceding the date of this Order in the usual and customary operation of its railroad and properties and the conduct of its business for wages, salaries, fees and similar charges, and for material, supplies and equipment.

(d) Pending further order of the Court the Debtor also is authorized in its discretion to adjust, compromise, make advances for, pay or reimburse others for: claims for or arising out of loss, damage or delay to freight or baggage; overcharges; reparation, adjustments of or refunds for freight or other charges on shipments in connection with which there are transit or storage privileges; freight, ticket, switching, car mileage, per diem switching reclaims and all other interline accounts and balances; rental of equipment or rental of or expense arising from use or operation or of over joint or other facilities; outstanding checks for wages fees or services; claims for personal injuries

to employees which are preferred under the acts of Congress relating to bankruptcy; and other claims, charges or adjustments of similar character between Debtor and other carriers in the conduct of their joint [fol. 53] business, between Debtor and its patrons and between Debtor and its employees; all regardless of when accrued.

(c) The cost of maintaining the corporate existence of the Debtor, including corporate, franchise, stamp and similar taxes, the necessary expense of keeping and preserving its corporate records, of maintaining transfer offices and agents, of registering and transferring its securities and of paying the proper charges and expenses of the trustees under indentures or mortgages pursuant to which securities of the Debtor have been issued.

(f) All payments due from time to time on existing pension systems, and all group insurance carried in whole or in part by the Debtor.

(g) Court costs and costs incurred before various state and federal Commissions or other administrative boards or tribunals.

(h) The expense of printing pleadings, motions, petitions, orders and other documents now on file or hereafter filed in this case, in sufficient quantities to provide copies thereof for the use of the Court, the Interstate Commerce Commission, the Debtor, parties to the cause, and others who may have a substantial interest therein; such expense to be taxed as costs in this case.

(4) That the Debtor, in its discretion, at any time prior to April 23, 1936, or prior to such other day as may be provided by further order of this Court, may disaffirm any of its existing contracts or leases. The disaffirmance of any such contract or lease shall be effective when notice of such disaffirmance, together with proof of service or mailing of a copy or copies thereof by registered mail to the [fol. 54] other party or parties to such lease or contract, shall be filed of record in this proceeding. The performance by Debtor of any such contract or lease within said period or future periods allowed for disaffirmance thereof shall not constitute or be evidence of the adoption or as-

sumption of such contract or lease by Debtor or the waiver by it of its right to disaffirm the same.

(5) That pending further order of the Court in the premises the Debtor is authorized and empowered to institute or prosecute in any court or before any tribunal of competent jurisdiction all such suits and proceedings as may be necessary in its judgment for the recovery or proper protection of its property or rights, and to make settlement of any thereof; and likewise to defend or to liquidate by written agreement or consent judgment, decree, order or award any claim, demand or cause of action whether or not suit or other proceeding to enforce the same has been or shall be brought in any court or before any officer, department, commission, board or tribunal, but no payments shall be made by the Debtor in respect of any such claims accruing prior to the date of this order, or in respect of any actions, proceedings, or suits on such claims, without further order or direction of this Court, except such as may be permitted by this or other orders hereafter entered herein, and such as constitute preferred claims under the acts of Congress relating to bankruptcy; and no action taken by the Debtor in defense or settlement of such claims, actions, proceedings, or suits shall have the effect of establishing any claim upon, or right in, the property or funds in the possession of the Debtor that otherwise would not exist.

(6) The Debtor shall close its present books of account at midnight on October 23, 1935. The Debtor shall open new books of account at the beginning of the day of [fol. 55] October 24, 1935, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the Debtor and shall preserve proper vouchers or receipts for all payments made on account thereof, and shall deposit the moneys coming into its hands in such of the banks in which funds of the Debtor are presently deposited as shall be selected by the Debtor, or in such other bank or banks as shall be selected and approved by this Court.

(7) That, not later than November 30, 1935, the Debtor shall file with the Clerk of this Court a statement of the assets and liabilities of the Debtor as of the close of business on October 23, 1935, and, within forty-five days after

the close of each calendar month thereafter, shall file with said Clerk a statement of the assets and liabilities of the Debtor as of the close of business on the last day of the second preceding calendar month, together with a summary statement of the revenues and expenses of the Debtor for the second preceding calendar month. All such statements shall be certified as correct by the chief accounting officer of the Debtor.

(8) That all persons, firms and corporations whatsoever, and wheresoever situated, located or domiciled, be and they hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties, or premises belonging to, or in the possession of the Debtor, or from taking possession of, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of its railroad or properties or the carrying on of its business [fol. 56] by the Debtor under the orders of this Court, or from commencing or continuing any suits against the Debtor wherein any bond, except a bond for costs, may be required of the Debtor herein, either during the pendency of said proceedings or of subsequent proceedings therein by appeal or otherwise: Provided, that suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction.

(9) That all persons and corporations holding collateral, including deposit balances or credits, heretofore pledged by the Debtor as security for its notes or obligations be and each of them hereby is restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, until further order of this Court.

(10) That the Debtor hereby is directed to give notice by mailing a copy of this Order to its mortgage trustees, and to cause a notice, directed to its creditors and stockholders, to be published within five days from the date of the entry of this Order once in The New Haven Journal Courier, a newspaper published in the City of New Haven,

and in The Hartford Daily Courant, a newspaper published in the City of Hartford, State of Connecticut, and in The Boston Herald, a newspaper published in the City of Boston, State of Massachusetts, and in The Wall Street Journal, a newspaper published in the City of New York, State of New York, and in The Providence Journal, a newspaper published in the City of Providence, State of Rhode Island, of a hearing to be held on November 6, 1935, at twelve o'clock noon, in the Court Room occupied by this Court in the United States Court House, New Haven, Connecticut, [fol. 57] at which hearing, or any adjournment thereof, this Court will appoint one or more trustees of the Debtor's property. The notice of such hearing shall be substantially in the form of the notice annexed hereto, made a part hereof, and marked "Exhibit A".

(11) This Court reserves full right and jurisdiction to enter at any time such further orders in the premises as the Court may deem proper, including the right to amend, extend, limit, modify, or otherwise change or rescind the present order.

When such mailing and publication has been completed the Debtor shall file with the Clerk of this Court its report with respect thereto.

Enter:

Carroll C. Hincks, District Judge.

Dated: October 23, 1935.

"Exhibit A," Annexed to Order No. 1

Notice to All Creditors
and Stockholders

of

The New York, New Haven and
Hartford Railroad Company

Pursuant to an order entered October 23, 1935, by the Honorable Carroll C. Hincks, Judge of the District Court of the United States for the District of Connecticut, notice is hereby given that a hearing will be held on November [fol. 58] 6, 1935, at twelve o'clock noon, by said Judge,

the courtroom usually occupied by him in the United States Court House, New Haven, Connecticut, at which hearing the Court will, pursuant to the provisions of Section 77 of the Act entitled: "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and acts amendatory thereto, and supplementary thereto, appoint one or more trustees of the property of said The New York, New Haven and Hartford Railroad Company.

The New York, New Haven and Hartford Railroad Company.

Dated at New Haven, Connecticut, October 23, 1935.

[fol. 59] In United States District Court

Extract from Page 7980 of Record, Referred To in Affidavit

The plan should also provide for the satisfaction of (a) current liabilities of the principal debtor incurred in the ordinary conduct of its business prior to the institution of the reorganization proceeding which are entitled to priority over any mortgages of the pri' pal debtor, (b) current liabilities and obligations of the bankruptcy trustees incurred during the reorganization proceeding, (c) expenses of reorganization allowed by the court within the maximum fixed by us, and (d) claims for interest and principal not paid at maturity because not presented for payment. To the extent that such claims, liabilities, or obligations are not paid by the principal debtor or the bankruptcy trustee pursuant to order of the court in the reorganization proceeding, they should be paid in cash or assumed by the reorganized company, provided that any amounts so assumed should constitute a charge upon the reorganized company with the same priority over its other obligations, as they would be entitled to in the reorganization proceedings. The plan also should provide that all such claims, liabilities, and obligations may be adjusted or compromised and dealt with or paid or discharged by the reorganized company, all as may be determined by the board of directors of the reor-

ganized company, subject to the approval of the court. We find that such claims against the principal debtor, when so treated, are not materially and adversely affected by the plan.

[fol. 60] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MEYER SCHEPS, SWORN TO ON JANUARY 10, 1951, IN OPPOSITION TO PETITION

STATE OF NEW YORK,
County of New York, ss.:

Meyer Scheps, being duly sworn, deposes and says:

1. I am an Associate Assistant Corporation Counsel of the City of New York, fully familiar with all of the matters hereinafter set forth, who argued in opposition to the petition of the New York, New Haven and Hartford Railroad Company before this Court on January 2, 1951.

2. This affidavit is made for the purpose of placing in the record and more particularly referring to certain filed papers adverted to by your deponent on the argument of the aforesaid petition and also mentioned in the memorandum submitted to the Court at that time.

3. Deponent referred to Order No. 736 in the above proceeding dated March 13, 1944. This Order classified creditors and stockholders in thirteen different classes.

4. Deponent further referred to Order No. 822 in this proceeding dated September 6, 1945. The paper referred to was the decree confirming the Plan of Reorganization.

5. Deponent further, upon the argument, adverted to the list of stockholders and creditors directed to be filed by [fol. 61] this Court pursuant to Order No. 736, aforesaid, as amended by Order No. 736-A, entered April 11, 1944. This list of *known* stockholders and creditors of the Debtor was submitted over the signature of H. J. Wells, Esq., attorney for the Trustees. The attention of the Court is called to the fact that nowhere on the said lists does the City of New York appear as a *known* creditor. Indeed the

City of New York does not appear on the said lists under any designation.

6. All of the foregoing papers are adverted to as though more fully set forth herein and are intended to be a part of the record of this application.

(Sworn to by Meyer Scheps on January 10, 1951.)

IN UNITED STATES DISTRICT COURT

ORDER NO. 736 CLASSIFYING CREDITORS AND STOCKHOLDERS—March 13, 1944

This matter having come on for hearing which was duly noticed pursuant to Order No. 699, entered herein on July 29, 1943; and the Interstate Commerce Commission having found and the Court having affirmed such finding in a decree [fol. 62] designated as Order No. 734, entered herein on March 6, 1944, that the equities of the stockholders of the Principal Debtor and of Old Colony Railroad Company have no value and that the interests of certain creditors will not be adversely and materially affected by the plan of reorganization pending herein or that such plan provides for the payment in cash of the claims of such creditors; and it further appearing to the Court that all parties in interest have been heard or given opportunity to be heard; and the Court being duly advised in the premises, it is Ordered:

I

That for the purposes of the pending plan of reorganization and its acceptance, the creditors and stockholders herein, to whom submission of said plan is required, are divided into the following classes according to the nature of their respective claims and interests:

Class 1.

All holders (not otherwise classified) of The Housatonic Railroad Company Five Per Cent. Fifty Year Consolidated Mortgage Gold Bonds due November 1, 1937.

Class 2.

All holders (not otherwise classified) of The New England Railroad Company Four and Five Per Cent. Fifty Year Consolidated Mortgage Gold Bonds due July 1, 1945.

Class 3.

All holders (not otherwise classified) of Danbury and Norwalk Railroad Company Four Per Cent. Fifty Year First Refunding Mortgage Gold Bonds due June 1, 1955.

[fol. 63] Class 4.

All holders (not otherwise classified) of Boston and New York Air Line Railroad Company Four Per Cent. First Mortgage Gold Bonds due August 1, 1955.

Class 5.

All holders (not otherwise classified) of New Haven and Northampton Company Four Per Cent. Fifty Year Refunding Consolidated Mortgage Gold Bonds due June 1, 1956.

Class 6.

All holders (not otherwise classified) of Central New England Railway Company Four Per Cent. Fifty Year First Mortgage Gold Bonds due January 1, 1961, including the National Rockland Bank (Boston) to the extent that said bank holds said bonds in pledge.

Class 7.

All holders (not otherwise classified) of the following debentures and bonds secured by the First and Refunding Mortgage of The New York, New Haven and Hartford Railroad Company to Bankers Trust Company, Trustee, dated December 9, 1920, as amended and supplemented:

The New York, New Haven and Hartford Railroad Company Series of 1927 Four and one-half Per Cent. First and Refunding Mortgage Bonds due December 1, 1967;

The New York, New Haven and Hartford Railroad Company Four Per Cent. Debentures due March 1, 1947;

The New York, New Haven and Hartford Railroad Company Three and one-half Per Cent. Debentures due March 1, 1947;

[fol. 64] The New York, New Haven and Hartford Railroad Company Six Per Cent. Debentures due January 15, 1948;

The New York, New Haven and Hartford Railroad Company Three and one-half Per Cent. Debentures due April 1, 1954;

The New York, New Haven and Hartford Railroad Company Four Per Cent. Debentures due July 1, 1955;

The New York, New Haven and Hartford Railroad Company Three and one-half Per Cent. Debentures due January 1, 1956;

The New York, New Haven and Hartford Railroad Company Four Per Cent. Debentures due May 1, 1956;

Consolidated Railway Company Four Per Cent. Debentures due July 1, 1954;

Consolidated Railway Company Four Per Cent. Debentures due January 1, 1955;

Consolidated Railway Company Four Per Cent. Debentures due April 1, 1955;

Consolidated Railway Company Four Per Cent. Debentures due January 1, 1956;

The National Rockland Bank (Boston) and Rhode Island Hospital National Bank (Providence) to the extent that each said Bank holds in pledge First and Refunding Six Per Cent. Bonds due July 1, 1972.

Class 8.

All holders (not otherwise classified) of The New York, New Haven and Hartford Railroad Company Six Per Cent. Fifteen Year Secured Gold Bonds due April 1, 1940.

Class 9.

The following holders of The New York, New Haven and Hartford Railroad Company short term collateral promissory notes secured by pledge of collateral:

[fol. 65] Railroad Credit Corporation,
Reconstruction Finance Corporation.

Class 10.

All holders (whether as pledgees or otherwise) of the following bonds of Old Colony Railroad Company issued

under and/or secured by the First Mortgage of Old Colony Railroad Company to Old Colony Trust Company, Trustee, dated January 30, 1924, as supplemented;

Old Colony Railroad Company Four Per Cent. Bonds due January 1, 1938;

Old Colony Railroad Company First Mortgage Bonds, Series A, Five and one-half Per Cent. due February 1, 1944;

Old Colony Railroad Company First Mortgage Bonds, Series B, Five Per Cent. due December 1, 1945;

Old Colony Railroad Company First Mortgage Bonds, Series C, Four and one-half Per Cent. due July 1, 1950;

Old Colony Railroad Company First Mortgage Bonds, Series D, Six Per Cent. due July 1, 1952;

Old Colony Railroad Company First Mortgage Bonds, Series E, Six Per Cent. due September 1, 1953.

Class 11.

All holders of stock of Providence, Warren & Bristol Railroad Company which is outstanding in the hands of the public in the aggregate amount of 449 shares.

Class 12.

All holders of stock of Providence, Warren & Bristol Western Railroad Company which is outstanding in the hands of the public in an aggregate amount of 3,382 shares.

[fol. 66] Class 13.

All other creditors of the debtors herein who are affected by the plan, excepting the Trustees of the properties of said debtors and of the Boston and Providence Railroad Corporation.

II

That within sixty (60) days from the date of this order, unless such time is subsequently extended by further order herein, the Clerk of this Court shall transmit to the Interstate Commerce Commission lists of all known stockholders and creditors of the debtors herein included in any of the foregoing classes, such lists to show the amounts and character of their debts, claims and securities, and the last known post-office address or place of business of each such

stockholder or creditor, and the debtors' trustees within said time shall file said lists herein.

Enter:

C. C. Hincks, District Judge.

Dated: March 13, 1944.

[fol. 67] In United States District Court

Order No. 736A Extending Time to File and Transmit Lists of Stockholders and Creditors—April 11, 1944

Upon the oral motion of the Trustees of the properties of the several debtors herein, and the Court being duly advised in the premises, it is ordered:

That the time heretofore fixed by section II of Order No. 736, entered herein on March 13, 1944, for filing and transmitting lists of all known stockholders and creditors as therein described be and it hereby is extended to and including June 12, 1944.

Enter:

C. C. Hincks, District Judge.

Dated: April 11, 1944.

[fol. 68] In United States District Court

Order No. 822 Confirming Plan of Reorganization—September 6, 1945

This cause having come on for further hearing pursuant to the order of this Court entered herein on May 25, 1945, for the purpose of determining whether the pending plan of reorganization shall be confirmed; all parties in interest having been given due opportunity to file their objections thereto in writing and having been heard or given opportunity to be heard thereon at a hearing duly noticed pursuant to said order of the Court; the Court having filed its opinion herein on August 31, 1945 and being duly advised in the premises

Finds:

1. That this Court has jurisdiction of the subject matter of these proceedings and of all of the parties in interest, and has jurisdiction of the debtors, The New York, New Haven and Hartford Railroad Company, Principal Debtor, Old Colony Railroad Company, Hartford and Connecticut [fol. 69] Western Railroad Company, Providence, Warren and Bristol Railroad Company, secondary debtors, and their properties, wherever located.

2. That on March 6, 1944, this Court filed an opinion, supplemented on March 15, 1944, approving the plan of reorganization previously approved and certified to it by the Interstate Commerce Commission and entered its Order No. 734 approving said plan. Said plan is contained in the Fifth Supplemental Order of the Commission, dated February 8, 1944, in Finance Docket No. 10992. After the entry of said Order No. 734 and pursuant to a direction therein contained, the Clerk of this Court sent to the Commission certified copies of such opinion and of this Court's opinion dated December 21, 1943 and a certified copy of said Order No. 734.

3. That this Court, pursuant to the appellate mandate of January 30, 1945, entered its Order No. 792 on February 13, 1945 referring said plan back to the Commission in order to give it opportunity to consider further the price to be paid for the property of Old Colony Railroad Company and the provisions of sections N(2) and N(3) of said plan.

4. That in its Sixth Supplemental Report and Order dated May 14, 1945, in Finance Docket No. 10992, a certified copy of which has been filed herein, the Interstate Commerce Commission has given further consideration to the matters required by said mandate and said reference and has affirmed and reiterated its recommendations thereon as contained in its said Fifth Supplemental Report and Order, and that, after hearing, said Sixth Supplemental Report and Order and all evidence received at said hearing have this day by separate order been included as part of the record [fol. 70] of this Court in the proceedings upon a plan, and that said Order No. 734 of this Court, being consistent with the requirements of the appellate opinions of January 2, 1945 and January 23, 1945, and with the appellate mandate

of January 30, 1945, in the light of the record as thus enlarged in all respects as to the Old Colony Railroad Company, has been reinstated as an order of this Court in full force and effect.

5. That on March 13, 1944, this Court entered its Order No. 736 dividing, for the purposes of said plan and its acceptance, the creditors and stockholders of the debtors herein to whom submission of said plan was required into thirteen classes according to the nature of their respective claims and interests, and directing that lists of all known stockholders and creditors included in any of said classes be filed herein and transmitted to the Interstate Commerce Commission, such lists to show the amounts and character of their debts, claims and securities and the last known post-office address or place of business of each such stockholder or creditor.

6. That thereafter, on June 12, 1944, the Trustees of the properties of the debtors filed said lists and on September 18, 1944, filed supplemental lists, and that copies of said lists and supplemental lists were transmitted to the Interstate Commerce Commission for its use in connection with the submission of said plan.

7. That by its order of August 22, 1944, in Finance Docket No. 10992, the Interstate Commerce Commission, Division 4, directed that said plan be submitted for acceptance or rejection to all holders of claims included in said thirteen classes and that such submission be effected by mailing to each such [fol. 71] stockholder, creditor, and claimant shown on the lists filed by said Trustees, and to each stockholder, creditor, and claimant not so listed whose claim against the Principal Debtor or secondary debtors had been allowed and who might request a ballot, a copy of said plan as set forth in the modified order of the Commission of July 13, 1943, approving said plan, as corrected by order dated February 8, 1944; a copy of the Commission's reports of February 18 and March 25, 1941, October 6, 1942, July 13, 1943, and February 8, 1944, with certain appropriate deletions; copies of the opinions of this Court dated December 21, 1943, March 6, 1944, and March 15, 1944, and a copy of Order No. 734 of this Court, dated March 6, 1944, approving said plan; a ballot, in duplicate, for the holders of claims in each of

the classes to be voted; and a statement by the Secretary of the Commission advising such stockholders, creditors or claimants of the approval and submission of the plan, describing the method of voting, and stating the time within which the executed ballots must be returned to the Commission.

8. That on September 26, 1944, the Interstate Commerce Commission, Division 4, duly submitted said plan for acceptance or rejection to the creditors and stockholders in said thirteen classes pursuant to the provisions of Section 77 of the Bankruptcy Act, as amended, notice of such submission being published by said Trustees as required by the Commission and this Court.

9. That by certificate dated December 29, 1944, the Interstate Commerce Commission, Division 4, duly certified to this Court the results of such submission, said certificate showing that ballots were duly cast and counted by the Commission as follows:

[fol. 72]

	Amount for Acceptance	Amount for Rejection	Percentage for Acceptance
Class 1, Holders of The Housatonic Railroad Company Consolidated Mortgage Bonds	$ 635,000	$ 357,000	64.01
Class 2, Holders of The New England Railroad Company Consolidated Mortgage Bonds	9,758,000	628,000	93.95
Class 3, Holders of Danbury and Norwalk Railroad Company First Refunding Mortgage Bonds	108,000	19,000	85.04
Class 4, Holders of Boston and New York Air Line Railroad Company First Mortgage Bonds	1,371,000	11,000	99.20
Class 5, Holders of New Haven and Northampton Company Refunding Consolidated Mortgage Bonds	1,711,000		100
Class 6, Holders of Central New England Railway Company First Mortgage Bonds	7,204,000	102,000	98.60
Class 7, Holders of Debentures and Bonds secured by The First and Refunding Mortgage of the Principal Debtor	62,715,700	2,406,400	96.30
Class 8, Holders of the Six Per Cent. Fifteen-Year Secured Bonds of the Principal Debtor	6,495,414.75	30,258	99.54

[fol. 73]

	Amount for Acceptance	Amount for Rejection	Percentage for Acceptance
Class 9, Reconstruction Finance Corporation and The Railroad Credit Corporation, Holders of secured notes of the Principal Debtor	6,555,953.79		100
Class 10, Holders of bonds issued under and/or secured by the First Mortgage of Old Colony Railroad Company	4,925,000	5,044,000	49.40
Class 11, Holders of the stock of Providence, Warren & Bristol Railroad Company outstanding in the hands of the public	31 shares		100
Class 12, Holders of the stock of Hartford and Connecticut Western Railroad Company outstanding in the hands of the public	720 shares	349 shares	67.35
Class 13, All other creditors of the debtors affected by said plan, excepting the Trustees of the properties of said debtors and of Boston and Providence Railroad Corporation	$11,671,653.72	$2,639,804.19	81.55

10. That this Court is satisfied that said plan has been accepted by or on behalf of creditors of each class to which submission is required by law holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on [fol. 74] said plan (with the exception of the creditors in said Classes 1 and 10), and by or on behalf of stockholders of each class to which submission is required by law holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan, and that such acceptances have not been made or procured by any means forbidden by law.

11. That this Court is satisfied and finds that said plan is predicated upon findings by the Commission which are supported by material evidence and are in accordance with legal standards and on the basis of said findings that said plan makes adequate provision for fair and equitable treatment for the claims of the creditors in said Classes 1 and 10, and that the rejection by such Classes is not reasonably justified in the light of the respective rights and interests

of the rejecting creditors in said Classes and all the relevant facts herein.

12. That this Court, pursuant to said appellate mandate of January 30, 1945, has heard the claims in administration of Rhode Island Hospital National Bank of Providence, of The President and Directors of the Manhattan Company, and of Merchants National Bank of Boston; that to the extent that the final disposition of such claims may be inconsistent with the provisions of subsections (14), (15) and (16) of Section J of said plan, this Court has the power under said plan to reconcile any such inconsistency; and that any such reconcilation would not materially affect any other provisions of said plan.

13. That in view of the provision of subsection (4) of Section N of said plan for the assumption and payment by the reorganized company of current liabilities and obligations of the Old Colony Trustees incurred during the reorganization proceedings, the final disposition of claims in administration filed herein on June 15, 1945 by The First [fol. 75] National Bank of Boston, The Chase National Bank of the City of New York, and The National Shawmut Bank of Boston will not materially affect any provisions of said plan.

14. That said plan conforms in all respects to the requirements of clauses (1) to (3), inclusive, of the first paragraph of subsection (e) of Section 77 of the Bankruptcy Act, as amended, and should be confirmed.

15. The foregoing findings shall be taken and deemed to be findings of fact and in addition, to the extent appropriate, conclusions of law.

It is therefore Ordered, adjudged and decreed:

I

That all objections heretofore filed herein to the confirmation of the plan of reorganization of the several debtors herein as contained in said Fifth Supplemental Order of the Commission dated February 8, 1944, which Fifth Supplemental Order is hereby made a part hereof by reference, be and they hereby are severally overruled and denied.

II

That said plan of reorganization of the several debtors herein be and it hereby is confirmed.

III

That the provisions of said plan of reorganization and of this order, subject to the right of judicial review, shall henceforth be binding upon the several debtors herein, all stockholders thereof, including those who have not, as well as those who have, accepted said plan, and all creditors secured or unsecured, whether or not adversely affected by said plan, and whether or not their claims have been filed. [fol. 76] and, if filed, whether or not approved herein, including creditors who have not, as well as those who have, accepted said plan.

IV

That the several debtors herein and any other corporation or corporations organized or to be organized for the purpose of carrying out said plan of reorganization be and each of them hereby is authorized and directed and shall have full power and authority to put into effect and carry out said plan and the orders of this Court relative thereto, under, and subject to the supervision and control of this Court, the laws of any State or the decision or order of any State authority to the contrary notwithstanding; provided, however, that no action taken by any of said debtors or such other corporation or corporations or any other person shall have any definitive, final or binding effect as a complete or partial effectuation of said plan unless or until a further order of this Court shall so provide.

V

That the property dealt with by said plan of reorganization, when transferred and conveyed to the reorganized company pursuant to said plan, shall be free and clear of all claims of the several debtors herein, their stockholders and creditors, and free and clear of all liens and other encumbrances, except as provided in said plan and in this order and except as may consistently with the provisions of said plan be reserved in any future order of this Court

directing such transfer and conveyance, and upon such transfer and conveyance and the assumption by the reorganized company of all debts and liabilities to be assumed under said plan or any order of this Court, the several debtors herein shall be discharged from all their debts and liabilities.

[fol. 77]

VI

That the rights and interests of all creditors and stockholders of the several debtors herein with respect to claims and securities affected by said plan of reorganization shall be only those provided by said plan as evidenced by and specified in the instruments executed pursuant thereto with the approval of this Court.

VII

That jurisdiction of these proceedings and of all parties in interest is hereby retained for the purpose of entering such other and further orders as this Court may determine to be necessary.

Enter:

C. C. Hincks, District Judge.

Dated: September 6th, 1945.

In United States District Court

Submission of Lists of Stockholders and Creditors—June 10, 1944

Pursuant to section II of Order No. 736, entered herein on March 13, 1944, as amended by Order No. 736-A, entered herein on April 11, 1944, Howard S. Palmer, James Lee [fol. 78] Loomis and Henry B. Sawyer, as the Trustees of the properties of the several debtors, by their attorney, herewith file lists of all known stockholders and creditors of the debtors herein included in all of the classes specified in said Order No. 736.

Upon the entry of said Order No. 736, the Trustees promptly took steps to obtain as complete and accurate

lists as were reasonably possible. To that end, approximately ten thousand cards were mailed to all those known or believed to be bondholders, a large number of banks and brokerage houses were circularized, and information was requested from various protective committees, mortgage trustees, paying agents and others. In addition, the Trustees had access to all stock registers and all lists of registered bondholders. And when it appeared that these efforts might not produce adequate results, advertisements for information were inserted in seventeen leading newspapers throughout the country.

The lists are arranged according to the classes enumerated in Order No. 736. In two instances more securities are listed than are actually outstanding. The attempt has been made to eliminate duplications, but adequate information has not been received to remove all of them or to keep abreast of all transfers of securities.

The lists are submitted with the understanding that their contents do not constitute admissions by any of the debtors or the Trustees in the proceedings herein or otherwise.

Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as Trustees as Aforesaid, (S.) by H. J. Wells, Their Attorney.

Dated: June 10, 1944.

[fol. 79] In United States Court of Appeals for the Second Circuit

[Title omitted]

Stipulation as to Lists of Stockholders and Creditors

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the name of the City of New York is not contained in the lists of stockholders and creditors submitted to the United States District Court, District of Connecticut, on June 10, 1944, by the Debtor, pursuant to Section II of Order No. 736,

entered herein on March 13, 1944, as amended by Order No. 736-A, entered herein on April 11, 1944.

Dated: November 8, 1951.

Denis M. Hurley, Corporation Counsel, Attorney for the City of New York, Appellant; E. R. Brumley, Attorney for the New York, New Haven and Hartford Railroad, Debtor.

(Lists omitted pursuant to stipulation printed herein at p. 117.)

[fol. 80] In United States District Court

[Title omitted]

Order Appointing Trustees—November 8, 1935

The matter of the appointment of one or more trustees of the Debtor's property, pursuant to the requirements of the amendment of August 27, 1935 to Section 77 of the Act of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States", as amended, having come on for hearing on November 6, 1935, and it appearing to the Court that the Debtor has given notice of this hearing as directed in its Order No. 1 of October 23, 1935, and the Court having heard the recommendations of counsel representing the Debtor and certain insurance companies and savings banks as to the personnel of the trustees, and the Court being of the opinion that the appointment of trustees herein should not disturb the [fol. 81] continuity of operations by the corporate organization of the Debtor and should be at minimum cost to the Debtor, and that the appointment of three trustees would best serve the interests of all parties in interest, it. is Ordered:

1. That Howard S. Palmer, President of the Debtor, of New Haven, W. M. Daniels, of New Haven, and James Lee Loomis of Granby, both of those later named being persons who within one year prior to the date of this order have not been officers, directors, or employees, of the Debtor, any subsidiary corporation, or any holding company con-

nected therewith, be and they hereby are appointed Trustees of the Debtor's property.

2. That the bond of each of said Trustees be and it hereby is fixed at $50,000.00, conditioned to the effect that he will well and truly perform the duties of a Trustee of the Debtor's property and duly account for any moneys and properties which may come into his hands, and abide by and perform all things which he shall be directed by the Court to do.

3. That these appointments shall become effective upon ratification thereof by the Interstate Commerce Commission.

4. That said Trustees shall within ten days after such ratification, execute and file with the Clerk of this Court such bonds, with sureties approved by said Clerk, for the benefit of whom it may concern.

5. That said Trustees shall have, following said ratification and upon filing such bonds, all the title and shall exercise, subject to the control of this Court and consistently with the provisions of said amendatory Section 77, all of the powers of a trustee appointed pursuant to Section 44 of [fol. 82] said Act or any other section of said Act, and, to the extent not inconsistent with said amendatory Section 77, the powers of a receiver in an equity proceeding, and, subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the Debtor.

6. That, following said ratification and upon the filing of such bonds, all of the property, real, personal and mixed, of every kind and nature whatsoever, of the Debtor shall by this order be vested in said Howard S. Palmer, W. M. Daniels and said James Lee Loomis, as Trustees of the Debtor's property.

7. That said Trustees shall have, following said ratification and upon filing such bonds, all the rights, privileges, powers and duties heretofore granted to or imposed upon the Debtor pursuant to said Order No. 1 of this Court and all orders supplementary thereto and amendatory thereof, and each and all of the orders heretofore entered in this proceeding shall with respect to said Trustees and the property of the Debtor, be of like force and effect as

though said Trustees were therein specifically named in the place of the Debtor, all of said orders being hereby incorporated in and made a part of this order by reference.

8. That, following said ratification and upon filing such bonds, said Trustees shall by this order have authority and power to designate employees of the Debtor to execute and deliver, in their stead and as their agents, checks, drafts, vouchers, orders, contracts, deeds, leases, easements, and any and all instruments of every kind and nature whatsoever, incidental to the operation of the property of the Debtor, and that such instruments, so executed by the agents of said Trustees, shall bind said Trustees the same as [fol. 83] though their signatures had been affixed thereto.

9. That this Court reserves full right and jurisdiction to make, from time to time, such additional orders herein as the Court may deem proper, as well as any orders amending, extending, limiting, modifying, or otherwise changing this order, and in all respects to regulate and control the conduct of said Trustees.

10. That the Clerk of this Court forthwith transmit to the Interstate Commerce Commission, Washington, D. C., a certified copy of this order and a copy of the stenographic minutes of said hearing of November 6, 1935, to the end that said Interstate Commerce Commission may determine upon the ratification of the appointments hereby designated and may, at its convenience, file with this Court its determination thereon.

Enter:

Carroll C. Hincks, District Judge.

Dated: November 8th, 1935.

A true copy. Attest: C. E. Pickett, Clerk, U. S. District Court, Conn. (Seal.)

[fol. 84] IN UNITED STATES DISTRICT COURT

EXTRACTS FROM ORDER NO. 1007

Section II, Subdivision 3

3. *Transfer and Discharge.* Upon the consummation date:

(i) all the business and affairs and the entire property and estate of the Debtor and the Secondary Debtors of every name and nature and all right, title and interest of Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as Trustees of the property of Debtor and the Secondary Debtors (herein called the "Bankruptcy Trustees"), the Certificate of Amendments having first been filed in the Office of the Secretary of State of the State of Connecticut, shall vest in and become the absolute property of the Reorganized Company, free and clear of all claims, rights, demands, interest, liens, encumbrances of creditors or other obligees of the Debtor, or of the Secondary Debtors, or their properties, except for the claims hereinafter referred to, which are to be assumed or paid by the Reorganized Company and of all rights and claims of the holders of shares of the capital stock of the Debtor and the Secondary Debtors;

(ii) the Debtor and the Secondary Debtors shall be discharged and released forever from all of their obligations, debts and liabilities, whether or not presented or allowed in these proceedings, including, without limitations, all claims made, assumed or guaranteed by the Debtor or the Secondary Debtors or enforceable against their property, except such claims as are to be paid or assumed by the Reorganized Company in accord with the Plan;

[fol. 85] (iii) all mortgages, bonds, notes, certificates and shares of stock and all other securities, leases, obligations, debts and liabilities without limitation as to their nature, whether made or assumed or guaranteed by the Debtor or the Secondary Debtors or enforceable against them or their property, shall become void and unenforceable against the Reorganized Company or its

successors or their property, save for such securities, leases, obligations, debts and liabilities as are to be paid or assumed by the Reorganized Company as hereinafter provided.

Nothing in this Section 3 of Subdivision II and nothing elsewhere in this order shall in any way affect or impair the rights of the holders of claims against and obligations of the Debtor and Secondary Debtors to be satisfied, paid or assumed as hereinafter provided.

Section VIII, Subdivision 1

Assumption of Obligations

1. *Obligations Assumed.* (a) On the consummation date, the Reorganized Company shall assume the obligations of the Bankruptcy Trustees or their predecessors in interest referred to in the instruments numbered as items (14) through (30) in Section 1 of Subdivision III of this order and to the extent provided in such instruments.

(b) The obligations of the Debtor under the bonds, indentures, guaranties and leases referred to in the instruments numbered as items (31) through (37) in Section 1 of Subdivision III of this order, shall continue unaffected and unimpaired by the Plan.

[fol. 86] (c) The Reorganized Company shall pay in cash, or assume, without further order of this Court, all claims insofar as not paid prior to the consummation date in respect of the following:

(i) All taxes justly due the United States from the Debtor and the Secondary Debtors.

(ii) The reorganization expenses of the Debtor and the Secondary Debtors.

(iii) Claims accruing as a part of the cost of the administration of the properties of the Debtor and the Secondary Debtors.

(iv) Any and all taxes due from the Old Colony Railroad Company, to the Commonwealth of Massachusetts and any city, town or other political subdivision thereof.

(v) All claims against the Old Colony Railroad Company classified as payable in preference to the

claims of the holders of bonds secured by mortgages on the property of the Old Colony Railroad Company.

(vi) The amounts due on any interest coupons, on the bonds made, assumed or guaranteed by the Debtor, which were payable but were not paid prior to October 23, 1935 upon presentation of such coupons for payment.

(vii) All executory contracts of the Debtor and Secondary Debtors and of the Bankruptcy Trustees not disaffirmed or dealt with in the Plan.

Provided, however, that the Reorganized Company may contest the amount and validity of any claim or obligation described in items (i) through (vi) of this paragraph (c).

[fol. 87]

Section XI

Injunction and Reservation of Jurisdiction

1. *Injunction.* All persons, firms and corporations, wherever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue, any suit or proceeding at law or in equity or otherwise, against the Reorganized Company, or its successors and assigns, or any of the assets of property of the Reorganized Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claim or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor or the Secondary Debtors, or any of its assets or properties, and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal or mixed, of any kind or character, on or at any time after the consummation date in the possession of the Reorganized Company, and from interfering with or taking steps to interfere with the Reorganized Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of the Reorganized Company, by reason of or on account of any obligation or obligations incurred by the Debtor or the Secondary Debtors or any of the Trustees in this proceed-

ing, except the obligations imposed on the Reorganized Company by this order; and all such persons, firms and corporations are also hereby restrained and enjoined from instituting, prosecuting or pursuing any suit or proceeding, at law or in equity or otherwise, against the Committee, or any of them, or against the Bankruptcy Trustees or against the Reorganized Company, or against any public officer, or [fol. 88] against any of said fiduciaries, for the purpose of preventing or delaying the consummation of the Plan or of this order.

2. *Reservation of Jurisdiction.* The Court hereby reserves jurisdiction in respect of the following matters:

(a) To examine and approve the final statement of account of the Bankruptcy Trustees for the period subsequent to June 30, 1947.

(b) To consider and pass upon the allowances to be made for compensation for the services rendered and expenses incurred by various parties to this proceeding and for counsel to the Committee.

(c) To pass on the final report of the Committee.

(d) To consider and act in the matter of any application for instructions with respect to the distribution of funds or securities in connection with this order and to construe the Plan as to matters which may require construction, not dealt with in this order.

(e) To consider and act in the matter of the proof of the claim of Irving Trust Company under item (vi) of paragraph (b) of Section 1 in Subdivision IX of this order.

(f) To consider and act in the matter of the proof of any claim against the Debtor which shall have been filed or for which provision shall have been made in the Plan as of the date of this order but the amount of which shall not have then been fixed.

(g) To consider and act in the matter of the reservation of the shares of Common Stock of the Reorganized Company in so far as necessary to provide for any [fol. 89] claim, including the claim of the Secured Sixes for the difference above mentioned, the amount of which has not been fixed as of the date of this order.

(h) To consider and act in the matter of directing

the sale of any of the Common Stock of the Reorganized Company which is not required for the satisfaction of the claims of unsecured creditors.

(i) To give instructions and directions to the Bankruptcy Trustees with respect to matters within the scope of their authority.

(j) To consider and act in the matter of the allowance of any and all claims arising out of the administration of the property of the Debtors and the Secondary Debtors.

(k) To consider and act in the matter of the disposition of the funds on hand with the Merchants National Bank of Boston consisting of interest paid on the New York, New Haven and Hartford Railroad Company First and Refunding Mortgage Bonds, Series E, held by Old Colony Railroad Company.

(l) To consider and act in any matter arising out of the option granted in the Plan to the Commonwealth of Massachusetts, for the purchase of the so-called "Boston Group Lines".

(m) To consider and act on any question respecting the "Critical Figures" established by the Plan with respect to the termination by the Reorganized Company of passenger service on the Old Colony Lines.

(n) To hear and determine any question arising as to the amount or legality of any tax claimed to be due [fol. 90] and owing to the United States from the Debtor or the Secondary Debtors or the Trustees in Bankruptcy or any of them for any taxable period subsequent to October 23, 1935 and prior to the entry of this order.

(o) To consider and act on any questions respecting claims between the Reorganized Company and the Boston and Providence Railroad Corporation or its Trustee arising out of the provisions of the Plan herein relating to the Boston and Providence Railroad Company or arising out of the operation of the lines of the Boston and Providence by the Bankruptcy Trustees or the Reorganized Company.

(p) To take such further action as may be necessary on account of or to carry out order No. 899 herein.

(q) To take such further action as may be necessary to put into effect and carry out this order and the Plan and all other orders relative thereto heretofore entered by this Court, *provided, however*, that nothing in this Section 2 shall be construed as a reservation of jurisdiction to change the Plan or any of the rights vested thereunder or any of the rights of the holders of the new securities of persons entitled to receive them.

2. Termination of Jurisdiction. Except as provided in Section 2 of this Subdivision XI hereinabove, all jurisdiction of this Court in or by virtue of these proceedings is hereby, as of the consummation date, wholly terminated and, except only as aforesaid and effective as of the consummation date, this proceeding is hereby closed.

Dated, September 11, 1947.

C. C. Hincks, United States District Judge.

[fol. 91] In United States District Court

Extracts from Plan of Reorganization

L. Claims against the principal debtor and secondary debtors, other than Old Colony, entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, shall be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of such debtors. All such claims, liabilities, and obligations may be adjusted or compromised and dealt with or paid or discharged by the reorganized company, all as may be determined by the board of directors of the reorganized company subject to the approval of the court. The Bankers Trust Company shall be indemnified against any loss it may incur by reason of the order of July 21, 1942, of the Tax Commission of the State of New York imposing against the series of 1927 bonds, issued under the first and refunding mortgage, mortgage-recording fees and penalties.

The reorganized company shall be deemed to have assumed such of the contracts of the principal debtor which are executory in whole or in part, including any executory leases and liabilities under guaranties but excepting any such obligations which are expressly disaffirmed herein, as shall have been affirmed or shall not have been disaffirmed by the bankruptcy trustees, with the approval or authorization of the court, prior to the date of confirmation of the plan, and also any executory contracts made by the bankruptcy trustees with the approval of the court which, by their terms, do not terminate at or prior to the conclusion of the reorganization proceeding.

The reorganized company shall assume liability for and pay in due course any and all taxes due to the United States from the principal debtor or its trustees, or from the Hart-
[fol. 92] ford & Connecticut Western, the Providence, Warren & Bristol, or their trustees upon the transfer of their properties to the reorganized company, for any taxable period prior to the date of confirmation of the plan without requiring proof thereof in this proceeding and without prejudice by reason of not having been proved herein, subject, however, to the statutes of limitations normally applicable to the assessment and collection of such taxes; provided, however, that the liability of the reorganized company for any taxes which are the subject of litigation on the date of confirmation of the plan, or which may become the subject of litigation on any date thereafter and prior to the expiration of the applicable statutes of limitations, shall be determined pursuant to law, and provided, further, that this provision shall not be deemed to preclude either the principal debtor, its trustees, or the reorganized company from contesting the merits of any such tax in the manner provided by law.

N. The reorganized company shall acquire as a part of its reorganization all of the properties, franchises, and assets of the Old Colony except those of the Old Colony's Boston group (those covered in Finance Docket No. 12614) upon the terms and conditions as follows:

* * * * * * *

(4) In consideration of the transfer and conveyance to the reorganized principal debtor of (a) all assets, properties

and franchises of Old Colony other than those of its Boston group and (b) the rights set forth above relating to the Boston group, the reorganized company shall issue and deliver to Old Colony's bondholders (including its banks as holders of the bonds pledged to secure their notes) pro rata, at the same time as reorganization securities are distributed to the principal debtor's creditors, in full satis- [fol. 93] faction of their rights with respect to such bonds and notes: $4,063,784 of new first and refunding bonds, series A, and $3,047,838 of new income bonds, series A; and the reorganized company shall also issue $857,143 of additional new first and refunding bonds, series A, and $642,857 of additional new income bonds, series A, of which the reorganized company shall deliver as aforesaid so much in principal amount, in the ratio of 32,896 of fixed interest bonds to 24,672 of income bonds, as the actual credit to Old Colony for the year 1943 shall exceed $346,000: and the reorganized company shall also (subject to the limitation provided herein concerning the Boston Terminal Company) assume and pay (a) the reorganization expenses of Old Colony as allowed by the court within the maximum limits fixed by this Commission, (b) current liabilities of Old Colony incurred in the ordinary conduct of its business prior to the institution of its reorganization proceeding which are entitled to priority over the Old Colony's secured obligations, (c) current liabilities and obligations of Old Colony trustees incurred during the reorganization proceeding, (d) any and all taxes due to the United States, the Commonwealth of Massachusetts, and/or any city, town, or other political subdivision thereof, from the Old Colony or its trustees for any taxable period prior to the date of confirmation of the plan of reorganization, without requiring proof thereof in the reorganization proceeding and without prejudice by reason of not having been approved in such proceeding, subject, however, to the statutes of limitations normally applicable to the assessment and collection of such taxes, and provided further, that the liability of the Old Colony for any taxes which are the subject of litigation on the date of the confirmation of the plan of reorganization, or which may become the subject of litigation on any date thereafter and prior to the expiration of the applicable

[fol. 94] statutes of limitations, shall be determined pursuant to law, and provided further, that this provision shall not be deemed to preclude either the reorganized company, the Old Colony, or its trustees, from contesting the merits of any such tax in the manner provided by law, and provided further, that with respect to taxes the funds for the payment of which are withheld by the principal debtor's trustees, payment by the reorganized company shall be limited to such portion of the total amount thereof as shall be agreed upon with the proper taxing authorities; provided, however, that nothing herein shall be construed as impairing or disturbing any present or future lien for taxes against any property; and (e) the reorganized company shall assume and discharge any and all other claims against the Old Colony which, as of the date of confirmation of the plan of reorganization, have been allowed by the court, excluding, however, any claims ranking junior to Old Colony's bonds.

O. The reorganized company shall acquire, as promptly as possible, all of the properties, franchises, and assets of the Boston and Providence Railroad Corporation, hereinafter called the Boston & Providence, on the terms and conditions set out below, such acquisition to take place in the ev nt of, and upon confirmation of, the Boston & Providence plan concurrently approved by us in Finance Docket No. 12131.

* * * * * * *

(2) In consideration for the transfer and conveyance to the reorganized company of all assets and property of the Boston & Providence, the reorganized company shall issue and deliver to the Boston Providence trustees $3,039,213 of its first and refunding bonds, series A, $1,467,520 of its income bonds, series A, and $1,467,520 of its preferred stock, [fol. 95] series A, and the reorganized company shall also (subject to the limitation provided herein concerning the Boston Terminal Company) assume and pay (a) the reorganization expenses of the Boston & Providence, as allowed by the court within the maximum limits fixed by this Commission, (b) current liabilities of Boston & Providence incurred in the ordinary conduct of its business prior to the institution of its reorganization proceeding which are

entitled to priority over the Boston & Providence's debentures, (c) current liabilities and obligations of the Boston & Providence trustees incurred during its reorganization proceeding, (d) any and all taxes due to the United States, the Commonwealth of Massachusetts, the State of Rhode Island, and/or any city, town, or other political subdivision thereof, from the Boston & Providence or its trustees for any taxable period prior or subsequent to the date of confirmation of a plan of reorganization for the Boston & Providence, without requiring proof thereof in the reorganization and without prejudice by reason of not having been proved in the Boston & Providence reorganization proceeding, subject, however, to the statutes of limitations, if any, normally applicable to the assessment and collection of such taxes, and provided, further, that the liability of the Boston & Providence for any taxes which are the subject of litigation on the date of the confirmation of the plan of reorganization, or which may become the subject of litigation on any date thereafter and prior to the expiration of the applicable statutes of limitations, shall be determined pursuant to law, and provided, further, that this provision shall not be deemed to preclude either the reorganized company, the Boston & Providence, or the latter's trustees, from contesting the merits of any such tax in the manner provided by law, and provided, further, that, with respect to taxes the [fol. 96] funds for the payment of which were not advanced by the principal debtor's trustees, payment by the reorganized company shall be limited to such portion of the total amount thereof as shall be agreed upon with the proper taxing authorities, provided, however, that nothing herein shall be construed as impairing or disturbing any present or future lien for taxes against any property and (e) the reorganized company shall assume and discharge any and all other claims against the Boston & Providence which, as of the date of confirmation of the plan of reorganization of the Boston & Providence, having been allowed by the court of jurisdiction in the proceeding for the reorganization of that corporation, excluding, however, any claims represented by the Boston & Providence debentures and any claims not ranking senior thereto.

R. The construction of the plan by the court shall be final

and conclusive. The court shall have the power to cure any defect, supply any omission, or reconcile any inconsistency in such manner and to such extent as may be necessary or expedient in order to carry out the plan effectively.

U. The carrying out of the plan shall be as provided in the Bankruptcy Act.

[fol. 97] IN UNITED STATES DISTRICT COURT

ORDER AND DECREE—September 5, 1951

The petition of The New York, New Haven and Hartford Railroad Company for instruction and relief as to certain assessments laid upon its real property in the Borough and County of Bronx, State of New York, by the City of New York, the supporting affidavit of George H. Webster, sworn to on January 23, 1951, the answer of the City of New York to said petition, and the affidavits of Meyer Scheps, sworn to on December 14, 1950 and January 10, 1951, in opposition to said petition, having been filed, served and read, and the petition having come on for hearing pursuant to Revised Order of Notice, dated November 6, 1950, and the petition having by direction of the Court been heard on January 2, 1951, and Hermon J. Wells, Esq., having appeared by Edward R. Brumley, Esq., in support thereof, and John P. McGrath, Esq., having appeared by Meyer Scheps, Esq., in opposition thereto, and briefs in support thereof and in opposition thereto having been filed, served and read, and due deliberation having been had, and the Court having issued its Memorandum of Decision, dated August 8, 1951, granting said petition, and notice of settlement of this Order and Decree to give effect to said decision having been waived, now, on motion of counsel for petitioner, it is Ordered and decreed:

1. That the petition be and it hereby is granted in all respects.

2. That neither the Plan of Reorganization of The New York, New Haven and Hartford Railroad Company nor the Consummation Order and Final Decree entered in the [fol. 98] reorganization proceedings of said Railroad Com-

pany nor any orders or deeds issued pursuant thereto require or direct the payment or assumption by said Railroad Company of any or all of the assessments set forth in Exhibit A attached to the petition, a copy of which is attached to this Order, or of the liens therefor.

3. That the real property of The New York, New Haven and Hartford Railroad Company is free and clear of the aforesaid assessments and of all liens therefor.

4. That the City of New York, its successors and assigns, be and they are forever restrained, enjoined and barred from enforcing the aforesaid assessments and the liens therefor, from starting or attempting to start any action or proceeding for their enforcement, and from interfering with or disturbing The New York, New Haven and Hartford Railroad Company or its real property on account of said assessments and liens.

5. That the City of New York shall forthwith cancel, discharge and remove of record all of the aforesaid assessments and the liens therefor.

Enter:

C. C. Hincks, U. S. D. J.

Dated: New Haven, Connecticut, Sept. 5, 1951.

Notice of settlement of the foregoing Order and Decree is hereby waived.

John P. McGrath, Corporation Counsel for the City of New York.

(List of Assessments annexed to Decree previously printed herein at page 7 as Exhibit A, annexed to petition.)

[fol. 99] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—September 18, 1951

SIRS:

Please take notice that the respondent, The City of New York, hereby appeals to the United States Circuit Court of Appeals, Second Circuit, from the order and decree entered herein in the office of the Clerk of the United States

District Court, District of Connecticut, on or about the 5th day of September, 1951, granting the petition in all respects, and which order and decree among other things orders and decrees that the real property of The New York, New Haven and Hartford Railroad Company is free and clear of the assessments set forth in Exhibit A attached to the petition and of all liens therefor, and the respondent, The City of New York, appeals from each and every part of said order and decree as well as from the whole thereof.

Dated, September 18th, 1951.

Yours, etc., Denis M. Hurley, Corporation Counsel of the City of New York, Attorney for Respondent, The City of New York, Office and P. O. Address: Municipal Building, Borough of Manhattan, New York City.

To Edward R. Brumley, Esq., Attorney for Petitioner-Debtor, Room 3841, Grand Central Terminal, New York City; Clerk of the United States District Court, District of Connecticut.

[fol. 100] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CITY'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL—September 18, 1951

Please take notice that the City of New York, appellant, designates as the contents of the record to be certified by the Clerk of the United States District Court, District of Connecticut, and to be filed with the Clerk of the United States Court of Appeals as the record on appeal, the following portions of the record on file in the District Court.

1. Statement under Rule 15b.
2. Petition of Debtor for Instructions, etc.
3. Revised order of Notice, annexed to Petition.
4. Exhibit A, annexed to Petition.
5. Affidavit of George H. Webster, in Support of Petition.
6. Answer of the City of New York.

7. Affidavit of Meyer Scheps, sworn to on December 14, 1950, in Opposition to Petition.
8. Order No. 32 referred to in Affidavit of Meyer Scheps.
9. Extracts from Order No. 1, referred to in Affidavit of Meyer Scheps.
10. Page 7980 of Record, referred to in Affidavit of Meyer Scheps.
11. Affidavit of Meyer Scheps, sworn to on January 10, 1951, in Opposition to Petition.
[fol. 101] 12. Order No. 736, referred to in Affidavit of Meyer Scheps.
13. Order No. 736A, referred to in Affidavit of Meyer Scheps.
14. Order No. 822, referred to in Affidavit of Meyer Scheps.
15. Submission of Lists of Stockholders and Creditors, referred to in Affidavit of Meyer Scheps.
16. Memorandum of Decision of Hincks, U. S. D. J.
17. Order and Decree of Hincks, U. S. D. J.
18. Notice of Appeal.
19. City's Designation of Contents of Record on appeal.
20. Stipulation as to Record.
21. Clerk's Certificate.

This designation is being filed and served pursuant to Rule 75a of the Rules of Civil Procedure.

Dated, September 18, 1951.

Yours, etc., Denis M. Hurley, Corporation Counsel, Attorney for City of New York, Appellant, Office and P. O. Address: Municipal Building, Borough of Manhattan, City of New York.

[fol. 102] In United States District Court

Appellee's Counter Designation of Contents of Record on Appeal—September 27, 1951

Please take notice that The New York, New Haven and Hartford Railroad Company, petitioner in the above-entitled action and appellee in this appeal, designates as the contents of the record to be certified as such by the Clerk

of the United States District Court, District of Connecticut, and to be filed with the Clerk of the United States Court of Appeals for the Second Circuit as the appeal record, the following portions of the record, in addition to those already designated by the City of New York in its designation dated September 18, 1951:

1. The whole of Order No. 1.
2. The whole of Order No. 5.
3. The whole of Order No. 32.
4. Subdivision 3 of Section II, Subdivision 1 of Section VIII and Section XI of Order No. 1007.
5. Sections L, N (4), O (2), R. and U of the Plan of Reorganization.
6. This designation.

This designation is being filed and served pursuant to Rule 75-a of the Rules of Civil Procedure.

Dated: September 27, 1951.

Yours, etc., Edward R. Brumley, Attorney for The New York, New Haven and Hartford Railroad Company, Appellee, Office and P. O. Address: 3841 Grand Central Terminal, Borough of Manhattan, New York, New York.

[fol. 103] In United States District Court

Memorandum of Decision on Motion of the Reorganized Debtor for Instructions, Hincks, J.—August 8, 1951

Statement

The New York, New Haven and Hartford Railroad Company, the petitioner herein and the reorganized company upon which have devolved the assets of the railroad-debtor which was reorganized in these proceedings, asks this court for instructions as to whether or not the Plan of Reorganization and the Consummation Order and Final Decree, in the reorganization proceedings brought pursuant to Section 77 of the Bankruptcy Act, require the payment or assumption of any or all of certain assessments laid by the

City of New York (hereinafter referred to as the "City") against various properties owned by the Debtor, herein, all more specifically set forth in Exhibit A attached to its petition, or make any reservations in favor of the City. The petition seeks a further order that, in the event the questions just posed are judicially answered in the negative, this court declare (a) that the described real property is free and clear of such assessments and of all liens thereof, (b) that the City be forever restrained, enjoined and barred from enforcing these liens and from interfering with or disturbing the petitioner and its real property on account of such liens, and (c) that the City be directed and ordered [fol. 104] to cancel, discharge and remove of record all such assessments.

The gravamen of the petition is contained in paragraph 8 thereof, wherein it is alleged that the City of New York, although it had timely notice of the reorganization proceedings of the petitioner, refused to file claims for any of the assessments set forth in Exhibit A attached to the petition; that the City's failure to comply with the terms of the Bar-Order, No. 32 in the reorganization proceedings, dated January 4, 1936, barred the City of New York from participating in the reorganization, and consequently rendered these liens unenforceable against the reorganized debtor.

The City contends that the reorganization proceedings in no way affected, limited or barred the City's outstanding assessments which had accrued and become liens prior to the institution of the reorganization proceedings. It further contends that since this Court never exercised jurisdiction over the City's liens during the proceedings it is too late to assert that jurisdiction now. Lastly, it is contended that the course of conduct of the Debtor, its Trustees and counsel practically construed the Plan of Reorganization as reserving the City's assessment liens and created an estoppel which prevents the petitioner from now maintaining a contrary position.

The New Haven condends that the plan and order make no reservation or exception in favor of the unpaid assessments here involved and contain no direction to pay or assume them. On the contrary, its contention is that the assessments and liens therefor are now forever barred,

and that the attempts made by the City of New York to collect and enforce them are in violation of this court's injunction.

Prior to October 23, 1935, the date of the filing and approval of the Petition in Reorganization, and between June [fol. 105] 8, 1894 and January 15, 1930, various assessments for local improvements were levied by the City, which purportedly under the City's charter became liens on specific properties owned by the New York, New Haven and Hartford Railroad Company. The principal amount of these liens is $134,153.94. If still in force, interest to December 31, 1950, has accumulated thereon in the amount of $369,653.92. All of these properties involved were located in the Borough and County of Bronx, City and State of New York.

At the time each such assessment was made, the City's Charter as then in force provided what I now assume to have been a complete and adequate procedure for administrative and judicial review. Within the time limited by the Charter, the debtor took no steps to avail itself of this procedure, taking the position throughout, I now am told, that the assessments were void *ab initio*. However, for all present purposes I assume that the assessments in question and the liens thereon were valid and, following the liened property into the hands of the bankruptcy trustees, continued to have vitality unless and until discharged, as the petitioner contends, by the Consummation Order and Final Decree in the reorganization proceedings.

The last assessment in point of time prior to October 23, 1935 (when the reorganization proceedings were instituted) contained in Exhibit A attached to the petition, was entered on January 15, 1930, and if valid became a lien, according to the applicable statute on January 25, 1930 (Greater New York Charter, Sec. 159, enacted by Laws of New York 1897, Chap. 378 as revised by Laws 1901, Chap. 466).

These assessments, if valid, constituted specific liens against the respective parcels of real property which are designated by block and lot numbers on the Tax Map of the City of New York (*Greater New York Charter, supra*, [fol. 106] Sec. 159; *New York City Charter*, adopted by referendum November 3, 1936, pursuant to Laws 1934, Chap.

867, in effect January 1, 1938, Sec. 314). These liens, if valid, each were enforceable exclusively against the specific property affected. (*Administrative Code of the City of New York*, 1937, Chap. 929, Sec. 415 (1)-23.0 et seq.; Chap. 17 Title D), and were not enforceable against any other assets of the debtor which was under no personal obligation to pay the same.[1]

If the assessments were valid, the specific lien of each from the moment of its attachment to the individual parcel of real property affected thereby became a first, prior and paramount lien against such premises, continued to be a lien thereon "preferred in payment to all other charges," (Greater New York Charter, supra, Sec. 1017; Administrative Code of the City of New York, supra, Sec. 415 (1)-7.0), unless and until later terminated in the reorganization proceedings under the paramount power created by the National Bankruptcy Act.

Each piece of real estate which the City now contends is subject to a valid and continuing lien has never been in the possession of the City: from the date of each assessment each such piece of real estate has been in the exclusive possession or the exclusive control of the debtor until the institution of the reorganization proceedings, thereafter of the debtor's trustees until the consummation of reorganization, and thereafter in the reorganized railroad company.

Further facts relevant to particular contentions made will be stated in connection with my discussion of the particular contention.

The parties are in conflict in their construction of the Plan of Reorganization. The plan provides (Section R): "The construction of the plan by the court shall be final and conclusive." In the Consummation Order and Final [fol. 107] Decree of the Court entered September 11, 1947, jurisdiction was reserved (Section XI 2(d)) "to construe the Plan as to matters which may require construction, not dealt with in this order." It is thus plain, and I think not disputed, that in the present situation the court has the power and duty to settle the conflicting contentions as to the proper construction of the Plan. I address myself to that task.

By amendatory legislation, viz., the Act of August 27, 1935, 49 Stat. 911, Section 77 of the Bankruptcy Act was amended to contain certain provisions:

> "The term 'creditors' shall include, for all purposes of this section, all holders of claims, of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, * * *." And
>
> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribed to stock), liens, or other interests of whatever character."

These provisions were carried over into 11 U. S. C. A. 205: they were in effect when the reorganization of the debtor was instituted on October 23, 1935, and were in force throughout the reorganization proceedings.

Under the unequivocal language of these provisions the City throughout the proceedings by reason of the claimed assessment liens here involved was a creditor within the purview of the Act because it held a "claim" against the debtor's "property," a "claim" being defined to include a "lien." This conclusion follows from the unequivocal dictum in *Gardner* v. *New Jersey*, 329 U. S. 565. I refer to this as *dictum* because there the court was concerned with taxes which were a general charge against all the debtor's lands, tangible property and franchises in the [fol. 108] State. Here, as the City points out, the charge was limited by State law to liens upon the specified property assessed. However, the opinion in the *Gardner* case refers to the definitions contained in Section 77(b) of "creditors" and "claims" as "sweeping" and "all-inclusive" leaving "room for no exception." The City here, just as much as the State of New Jersey in the *Gardner* case, was a "creditor" and its liens were "claims" against the debtor.

Subdivision (c)(7) of the same Act, also contained a provision, also in effect throughout these proceedings, viz.:

> "The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced, and after which no claim not so

filed or evidenced may participate except on order for cause shown * * *"

The City concededly neither within the time limited, nor within any extension thereof which it might have sought (but never did seek), filed any claim throughout the proceedings. Consequently, even if its claimed liens were valid and in force in 1935, which I assume for all purposes of this memorandum, under the plain language of the Act its liens may not "participate". The prohibition against *participation*, in the statutory context, obviously must be construed as broad enough to include the continuing right to have effect as valid liens upon the debtor's property: a creditor whose lien the plan leaves undisturbed certainly participates in the debtor's property.

Section 77 also contained in subsection (f) the following provision which was in force throughout the proceedings.

"(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon * * * all creditors secured or unsecured, whether or [fol. 109] not adversely affected by the plan, and whether or not their claim shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. * * * The property dealt with by the plan, when transferred and conveyed to the debtor * * * shall be free and clear of all claims of * * * creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer * * *"

This language was incorporated into the plan by reference, Sec. U thereof providing that "the carrying out of the plan shall be as provided in the Bankruptcy Act": the language was expressly incorporated into the order of confirmation entered September 6, 1945 (P. R. 11931). And pursuant to the authority contained in this subdivision of Sec. 77, the order of court directing the transfer of the debtor's property, as contained in its so-called "Consum-

mation Order and Final Decree" of September 11, 1947, under the heading "Transfer and Discharge" in express language included an adjudication that "the entire property * * * of the Debtor * * * shall vest in and become the absolute property of the Reorganized Debtor, free and clear of all claims * * * liens * * * of creditors * * *, except for the claims hereinafter referred to, which are to be assumed or paid by the Reorganized Company * * *." Said order in a later section followed the plan itself in specifically identifying and excepting some 27 separate obligations which were to be assumed (many of them liens): the order expressly provided for the payment in cash by the reorganized debtor of all taxes due the United States and for the payment of taxes from a specified secondary debtor (Old Colony) to the Commonwealth of Massachusetts. But neither the plan [fol. 110] nor the Consummation Order excepted the City's liens here in question from the provision that the reorganized debtor should hold "its entire property" * * * free and clear of all claims.

The content and provisions of the plan quoted and referred to above, against the statutory background and the confirmation order of September 6, 1945, which has effect under subdivision (f) of Sec. 77 quoted above, make plain the intent that the reorganized company was to hold free from claims never filed such as the claims of the City for the assessments and liens now in question. To give these liens continuing effect would violate the express prohibition of subdivision (c)(7) of Section 77 quoted above. Certainly the court should not impute to the plan a meaning which not only would be inconsistent with its text and the terms of the Order of Confirmation and Order of Consummation but also would be in violation of subdivisions (c)(7) and (f) of Section 77.

The City points to the fact that when Order 32, fixing the time within which claims were to be filed, was entered, the court ordered notice thereof by mail to the mortgage trustees but to other creditors, including the City, only by publication. As to this the City does not dispute that it had actual notice of the bankruptcy: its argument is that the failure of court to cause notice by mail to be given the

City whose claimed lien was prior to that of mortgage trustees imported an intent to leave the City's liens undisturbed. The argument is specious. Order 32 was entered in 1936 long before any plan of reorganization had been proposed. Order No. 1, on October 23, 1935, had included substantially the same provision of notice as was included in Order 36. It would be preposterous to construe the substantive provisions of a plan confirmed in 1945 by reference to the terms of an *ex parte* administrative order of notice entered in 1936 before any plan at all had been formulated. Surely the City cannot seriously argue that [fol. 111] on reading the initial petition for reorganization the court foresaw what some future plan would ultimately provide for unnamed creditors and shaped its order of notice accordingly. In 1935 and 1936 necessarily the court could only assume that only creditors whose claims should be filed and approved would participate in the debtor's assets.

By somewhat similar, and equally specious, reasoning the City points to Order 736 of March 13, 1944, classifying creditors and stockholders for purposes of the plan. The City was not mentioned in this order and seemed not to fall within any stated classification. From this it is argued that for purposes of the plan the City was viewed as not affected by the plan,—that it's lien was to be left undisturbed. Here again the City shut its eyes to the prohibition of subdivision (c)(7) of Section 77. The absence of any approved claim was of course the real reason for not including the City in the classification.

With greater plausibility the City invokes Section L of the Plan which provides:

> "L. Claims against the principal debtor and secondary debtors, other than Old Colony, entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, shall be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of such debtors."

However, reading this provision against the context of Sec. 77 and particularly subdivisions (c) and (f) thereof quoted above, it is apparent that in Sec. L, in speaking only of "claims" meant *filed* claims: subdivision (c)(7) of Sec. 77 [fol. 112] denies any and all priority to claims not filed. Since the City's claim was never filed it was not a *claim entitled to priority* under Section L.

Nor can the City justly find comfort in the provisions of the final decree which expressly provided for the continuance of tax liens of the City of Boston on property of the Old Colony, a secondary debtor to whose property under the plan the reorganized company succeeded. That no such provision was stated for the City's liens imports an intent that no similar exception of the City's liens was intended. And for this difference in treatment there were at least two good reasons: (1) the Boston liens had been properly submitted to the Court for an order of payment, and (2) the Boston liens had accrued when the liened property was in the hands of the court's trustees and thus had the status of claims against the trustees, which under basic provisions of law were classified as expenses of administration and as such were to be assumed by the reorganized property.

The City also points to the provisions of the deed which pursuant to the Consummation Order and Final Decree transferred the property to the reorganized debtor. By this deed the property was "subject to the liens of taxes and assessments lawfully levied or assessed against the same". But this provision of the deed must be construed in harmony with the Consummation Order (which has already been discussed) and the terms of the Habendum Clause in the same deed which made it plain that the reorganized company took free and clear except as to "obligations imposed on the Corporation pursuant to the Consummation Order or assumed by the Corporation pursuant to the Consummation Order." As pointed out above the Consummation Order did *not* impose the City's liens on the reorganized corporation.

In short, on the point of construction none of the City's arguments have sufficient substance to alter my conclusion [fol. 113] that it was the intent of the plan that the reorganized company should take free and clear of all claims

not filed in the reorganization proceeding including those of the City now under consideration.

The contention that the prohibition of subdivision (c)(7) of the Act, adverted to above, does not apply because the trustees in bankruptcy took no affirmative action to litigate the validity of the City's lien has no support in the text of the Act or in any adjudicated cases. The case of *Delaney v. City of Denver*, 185 F. 2d 246 upon which the City heavily leans, is not in point. That case was not one under Sec. 77: it dealt only with treatment of liens in ordinary liquidation cases in bankruptcy. There the court was not confronted with the unequivocal prohibition of (c)(7) of Section 77. The non-action by the trustees, like non-action by a creditor, may not serve to amend an Act of Congress.

But even the *Delaney* case did not go so far as to hold that when liened property has passed into the possession of the trustee in bankruptcy the lien creditor may stand outside the bankruptcy proceedings and after their termination enforce his lien against the property notwithstanding an order of the bankruptcy court discharging all claims not filed. The opinion holds merely that "after the jurisdiction of the bankruptcy court has attached to the security, the lien claimant may assert his claim to such security—only in the bankruptcy court" and that to that end a creditor's petition to the bankruptcy court while the estate was still open was timely even though filed some two months after the six-month period allowed under the Chandler Act for the filing of claims. Although the opinion states—by way of dictum, be it noted, that the lien creditor "may not file a claim at all and rely solely on his lien" it cites to that proposition *United States National Bank* v. *Chase National Bank*, 331 U. S. 28, at page 33, where the Supreme Court qualified that right by restricting it to cases in which "the [fol. 114] security is properly and solely in his (i.e., the creditor's) possession." That qualification was satisfied neither in the *Delaney* case nor in the case now at bar. And there was neither holding nor intimation in the *Delaney* case that the lien there involved would have survived if as was the fact here, no claim of lien *and no petition to enforce a lien* had been filed while the bankruptcy case was open.

After all, Section 77(c) confers on the reorganization court "exclusive jurisdiction of the debtor and its property

wherever located." In the *Gardner* case this grant was held to include property subject to liens of the State of New Jersey. It was there said: "This is comprehensive language suggesting that all liens are included, not that some are beyond the reach of the court." Such language may not be emasculated by writing in a limitation whereby the jurisdiction broadly granted shall exist only if affirmatively invoked by trustees in bankruptcy.

Lastly, the City contends that, by reason of the affirmative conduct of the court's trustees and their counsel, the reorganized company is estopped from asserting that it now holds the real estate upon which the City's assessments were made free from the lien thereof. The contention is based upon the fact that in the course of the reorganization proceedings the court's trustees made certain payments to discharge assessment liens of the City, similar to those now involved, upon specific pieces of real estate. These payments were made, without specific order of court and without any prior notice to other creditors in the reorganization proceedings, in some cases in order to obtain from the City the proceeds of liened properties which had been sold in lieu of condemnation, and in all cases wholly without acknowledgment that the assessments were valid or that similar assessments would be paid. Most of the payments to which the City refers in this connection were paid in 1936 [fol. 115] long before any plan at all had emerged and all had been made, of course, before the claims therefor had been barred by the entry of the Consummation Order and Final Decree. And all the payments referred to were made when the City still had time (a) either to petition the reorganization court for permission to make a late filing of its claim,—a permission which was consistently accorded to other creditors throughout the reorganization proceedings, or (b) to file a petition of intervention, as was done in the *DeLaney* case, for the enforcement of its liens.

This position, also, is untenable. In the first place, there is no factual basis for a finding that the non-action of the City was in any way due to these payments. There were no express representations which induced non-action. A payment of one claim while it still has vitality, without more, is surely not enough to induce a reasonable belief that other similar claims to the same creditor will be paid

even if they shall thereafter became barred. And especially is this so when the fiduciaries making the payments now relied on were acting under a statute prohibiting participation by barred claimants. If the payment of a few claims had any tendency to induce non-action one would expect that the consistent refusal throughout proceedings lasting twelve years to pay the great bulk of such claims would have a stronger tendency to demonstrate the imperative need of affirmative action. As to payments by the trustees of claims which accrued in the course of the reorganization proceedings, these, of course, are wholly irrelevant. Such claims, as expenses of administration, were not within the scope of the bar order.

And in law there is no support for the claimed estoppel. Creditors in the reorganization proceedings, whose rights against the debtor under the plan have now been transformed into rights in and to the reorganized company, could not be validly estopped by the administrative acts of the [fol. 116] debtor's trustees of which they had neither knowledge nor notice. Nor may the doctrine of estoppel serve to nullify the statutory prohibition of Sec. 77(c)(7). The only permissible inference is that all the parties acted with a view to the applicable law.

Somewhat as an afterthought, by reply brief the City advances the contention that my indicated rulings will deprive it of its liens without due process. The contention is predicated upon earlier provisions of the Bankruptcy Act not applicable to proceedings under Sec. 77. No contention is made that the procedure of Sec. 77 was not faithfully followed in these proceedings, or even, if that be important, that the City lacked knowledge of the pendency of these proceedings under Sec. 77. Thus the City was chargeable with knowledge throughout that if the claims

Footnote: (1) Whether the liens under the law of New York were enforcible by foreclosure upon the property specifically liened is a point not developed in argument and brief. From the silence of the parties on this point I infer that they consider it irrelevant for present purposes and in that view I acquiesce. I assume, however, that even if foreclosure was an available collection remedy no right to a deficiency judgment against the debtor was authorized.

were not filed it might not participate. Its continued failure to assert its claims in any way while the proceedings were in progress cannot be attributed to lack of due process.

I conclude that the petition should be granted. A decree providing the relief sought may be submitted for settlement in chambers, on notice unless notice be waived.

Dated at New Haven this 8th day of August, 1951.

C. C. Hincks, United States District Judges.

[fol. 117] In United States Circuit Court of Appeals for the Second Circuit

[Title omitted]

Stipulation Omitting Certain Papers—November 1, 1951

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the list of stockholders and creditors referred to in the affidavit of Meyer Scheps, the entire plan of reorganization and all of Order No. 1007 (except those portions printed in the transcript of record) be omitted from the transcript of record without prejudice to the right of either party to refer to the same on the argument of the appeal or in the briefs, with the same force and effect as though printed in full.

It is further stipulated and agreed that if any of the foregoing are referred to in the briefs or upon the argument copies thereof will be handed up to the Court.

Dated, New York, November 1, 1951.

Denis M. Hurley, Corporation Counsel, Attorney for Appellant; E. R. Brumley, Attorney for Appellee.

[fol. 118] In United States District Court

Stipulation as to Record—November 15, 1951

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the foregoing is a true transcript of the record on appeal of the

said District Court in the above-entitled matter, as agreed upon by the parties, and may be filed in lieu of the original papers for the purpose of certifying a record on appeal.

Dated: November 15th, 1951.

Denis M. Hurley, Corporation Counsel, Attorney for the City of New York; Appellant; Edward R. Brumley, Attorney for The New York, New Haven and Hartford Railroad, Appellee.

[fol. 119] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 120] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1951

No. 213

Argued April 17, 1952. Decided June 5, 1952

Docket No. 22293

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor

THE CITY OF NEW YORK, Appellant,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Appellee

Before Swan, Chief Judge, Augustus N. Hand and Frank, Circuit Judges

Appeal from the United States District Court for the District of Connecticut

This is an appeal by the City of New York from an order entered in the debtor's reorganization proceedings.

[fol. 121] Denis M. Hurley, Corporation Counsel, for appellant; Seymour B. Quel, Meyer Scheps and Anthony Curreri, of counsel.

Edward R. Brumley, Attorney for Appellee; Robert M. Peet, of counsel.

Per CURIAM:

Order affirmed on the opinion of the District Court, — F. Supp. —.

FRANK, Circuit Judge, dissenting:

The district judge in his opinion, and my colleagues in adopting and affirming it, have, I think, overlooked the crucial issues which are these: Subdivision (c)(8) of § 77 requires that the "judge shall cause reasonable notice" to be given, "by publication or otherwise," to creditors "of

the period in which claims may be filed," after which period, under (c)(7), no claim not filed "may participate except on order for cause shown." Is it "reasonable" for the judge in a § 77 proceeding to direct the bankruptcy trustees to give no such notice, other than by publication, to a known creditor? If not, and if no other notice (so to file claims) is given such a known creditor, will the final decree in reorganization destroy the rights of such a creditor whose claim is not covered by the reorganization plan, simply because he has not filed, or sought to file, a claim? As I think the answer to both questions is "No," I would reverse in this case. (See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306; *Smith* v. *Apple*, 6 F. (2) 556, 564 (C. A. 8), and other cases discussed *infra*.)

The debtor here was the former New Haven Railroad Company. Its reorganization proceedings took place in [fol. 122] the United States District Court for the District of Connecticut. The claimant is the City of New York. Its claims consist of tax liens for assessments on some of the debtor's real property in New York City. Because of their nature, the railroad was never personally liable on these claims; they were enforceable only against the specific pieces of real estate assessed. In most instances, the City does not even know the names of the owners of the real estate assessed. For that reason, and because of the expense of collecting by judicial procedure the large number of such claims, the City, since there is no statute of limitations running against the liens, normally collects its due on the sale of the assessed property when the owner seeks to pass a clear title to the purchaser.

Here, the debtor and its reorganization trustees, knowing of the City's claims and, of course, knowing the City's address, never gave the City actual notice, by mail or word of mouth, that on January 4, 1936 the bankruptcy court had entered a bar order, Order No. 32, requiring all creditors to file their claims before May 1, 1936, or have them wiped out. The only notice of the bar order to the City was by newspaper publication which never came to the City's attention. After the expiration of the period fixed in the bar order, the City (in some way not explained) heard of the pending reorganization proceedings, but never learned of the bar order. In 1936, 1940 and 1942 the trus-

tees had dealings with the City concerning some of its tax lien claims which were then paid in full or (by compromise) in part—without the City filing any claim in, or appearing in, the reorganization proceedings, although those claims were of the same kind as the claims here in dispute. The trustees then never even hinted to the City of the making of the bar order or suggested that the City's remaining $134,000 claims would be destroyed if the City did not, by leave of court, file claims in the proceedings.

[fol. 123] 1. Undeniably, there was a clear violation in these proceedings of the notice requirements of § 77, requirements designed for the protection of creditors. This chapter of non-compliance begins with a failure to comply with subdivision (c)(4) of § 77. That subdivision says that the judge shall direct "the trustees * * * to file with the court a list of all known creditors of the debtor, and the * * * character of their debts, claims and securities, and the last known post-office address or place of business of each * * * creditor." The judge never directed the filing of such a list. No list was ever filed containing the name of the City or referring to its claims although the new railroad freely admits that the debtor and the trustees knew about them.

The new company argues, unreasonably I think, that, even if such a list had been prepared, the City's name would have been omitted and properly so because the debtor and the trustees had, from the beginning, disputed the validity of the City's claims. The error of the argument is that the statute clearly contemplates the inclusion in that list of doubtful or disputed claims, since it specifically immunizes the debtor or its trustees from any bad effects therefrom: "The contents of such lists shall not," says subdivision (c)(4), "constitute admissions * * * in a proceeding under this section or otherwise." But this argument does lead to a suspicion that the real reason behind the trustees' silence may just possibly have been that something would happen exactly like that which did happen here, *i.e.*, the City, not receiving notice of the bar order, would not file claims; its unfiled claims would be by-passed in the reorganization plan; and the new company would then assert that, after final decree, those claims were worthless.

The failure of the judge to direct the trustees to file a

proper list containing the names and addresses of known [fol. 124] creditors, and the failure of the trustees to file one, was followed by a further signal failure to comply with the statute, and led to the fact that the City was not properly notified, and did not learn, of the bar order: When the judge came to ordering notice to creditors of that bar order, he did not provide that notice by mail be given to all known creditors with known addresses (a class which included the City). Instead, he adopted the following classification: (1) notice by mail to be given all creditors who had entered appearances up to that date (whether or not their claims had been allowed or were considered "valid") and also to certain prominent indenture trustees whose liens were junior to the City's; (2) notice by publication to all other creditors, *i.e.*, all non-appearing creditors—whether known or unknown.

The judge, in effect, substituted, as far as notice of the bar order was concerned, "appearing" creditors for "known" creditors. Section 77(c)(8), in contrast, requires that "reasonable notice of the period in which claims may be filed, * * * be given to creditors * * *" It is not by accident that the provision for a list of "known" creditors (§ 77(c)(4)) precedes §77(c)(8): Congress intended that the judge should cause appropriate notice to be given to all "known" creditors, and contemplated that such notice would be different from that given unknown creditors.

Subdivision (c)(8) does not, I think, sanction an arbitrary distinction, as regards such notice, between appearing and non-appearing creditors. Such a distinction is unreasonable. It runs exactly contrary to the giving of "reasonable" notice. For obviously it is not the "appearing" creditors who are most in need of notice of the bar order. Their appearances show they already have an active interest in the proceedings. It is precisely those known creditors who have not appeared—creditors like the City—[fol. 125] who need the notice, prescribed by statute, of the deadline for filing claims.

It is most important, then, that notice by publication does not constitute "reasonable notice" in circumstances like these, where the creditors are known and can easily be notified by mail. This has been definitively settled by *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S.

306. There a New York statute, which provided for the cutting off of claims to a common trust fund after notice, by publication only, to beneficiaries about a proceeding brought by the trustee to settle accounts, was held unconstitutional as to those beneficiaries whose names and addresses were known, and who could be easily notified by mail. Said the Supreme Court: "* * * when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. * * * It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's formal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with [fol. 126] actual notice, we are unable to regard this as more than a feint. * * * Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency. The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses."

The *Mullane* case summarized what the Supreme Court had been saying for a long time before. *Hess* v. *Pawloski*, 274 U. S. 352, upheld a non-resident motorist statute, providing for service on the non-resident by serving the registrar in the state where the accident occurred and

notifying the non-resident motorist by registered mail, because "it is required that he (the non-resident) shall actually receive and receipt for notice of the service and a copy of the process." Cf. *Wuchter* v. *Pizzutti*, 276 U. S. 13 (where a non-resident motorist statute not providing for mail notification was held lacking in due process); *International Shoe Co.* v. *Washington*, 326 U. S. 310. See also 2 Moore, Federal Practice, par. 4.16 (2d ed. 1948). In *McDonald* v. *Mabee*, 243 U. S. 90 (holding that notice by publication was inadequate to secure jurisdiction over a defendant technically domiciled in Texas but who had actually gone elsewhere to establish residence, although in the same circumstances personal service at his Texas abode might have sufficed), Holmes, *J.*, said: "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact * * * To dispense with personal service, the substitute that is most likely to reach the defendant is the least [fol. 127] that ought to be required if justice is to be done." For constructive notice is a fiction.[1]

3. Although the City did not receive reasonable notice of the bar order because the district judge neglected to comply with subdivisions (c)(4) and (c)(8), the judge now holds (with my colleagues' approval) that the City has lost its rights because it neglected to follow up constructive notice. The judge rests this harsh conclusion on the fact that the City learned, in an unexplained way, not of the bar order, mind you, but merely of the existence of the reorganization in 1936 (as near as we can tell, after the end of the original period for filing claims but in time to apply to the court for late permission to file). However, without some specific statutory provision imputing knowledge of the bar order to anyone having merely knowledge of the reorganization proceedings, I think the City cannot be charged with notice of whatever it could have found, if it had carefully examined the reorganization records.

[1] See *Schoedel* v. *State Bank of Newburg*, 245 Wis. 74, 76, 13 N. W. (2d) 534. "At the outset, attention should be called to the fact that constructive notice is in point of literal fact neither notice nor knowledge. * * * The term 'constructive' is the mere trademark of a fiction."

In the first place, consider the practical aspects of my colleagues' ruling: If the City is thus charged, its burden will be insupportable. It has no system by which it can tell who are the proper owners of each piece of land against which local assessments may be laid. To find that out, it would have to search the titles of each piece. More, if my colleagues' ruling stands, the City will be responsible for recognizing the names of all such property owners in the notices of bankruptcy proceedings, and for tracking down the records in those proceedings all over the United States, looking for bar orders. The waste of time and energy seems pointless when the debtor's trustees know the City is [fol. 128] a creditor entitled to notice, and have only to include the City in the list of known creditors to be notified of the bar order by mail.

But let us disregard this argument of impracticality, and consider the singular judicial attitude here displayed: (1) The statute expressly commanded the court to give a known creditor "reasonable notice" of the bar order, and that means notice by mail. (2) The court did not obey that express command. (3) Yet the court, having neglected its own express duty, now excuses that neglect by fictionally imputing to the creditor "constructive notice" of the bar order, holding that the creditor was fatally negligent in not following up the knowledge, fortuitously obtained, that the reorganization proceedings existed to the point where the creditor would find in the court files the notice to file claims. In the circumstances, to hold the creditor negligent seems to me strikingly unjust: As the statute called for actual notice of the bar order, the creditor ought not be asked to act on less, especially since (as I shall point out later) the doctrine of judge-made constructive notice depends on gross negligence by the person said to be charged with such notice.

(I must add, parenthetically, that, in referring to the trial judge's neglect, I am not taking a superior attitude: Any judge, being a man, may err at times; and certainly my memory of my own judicial career shows me that I have done so. But all that is beside the point here.)

Here, by chance, the creditor came to hear of the proceedings; we may assume that the creditor was familiar

with the statute; the statute told him that the court would order that he be given specific notice of the time to file his claims. Was it not reasonable for him to wait to file until he received such a notice? Why, then, call him negligent for not filing when he did not receive such notice required by the statute?

[fol. 129] Apposite is *Smith* v. *Apple*, 6 F. (2d) 559, 564 (C. A. 8). There a state-court ordered a certain further step to be taken in a suit within the near future and on notice to the parties to the suit. This further step was taken without any notice to one of the parties; and a decree against that party was entered accordingly. The Eighth Circuit said: "While it is true that parties properly in court must take notice of steps in the litigation, yet where an order of court requires notice before specified action be taken, the parties have a right to rely upon the giving of that notice and are not bound by such action taken without notice and without their actual knowledge." *A fortiori*, mere knowledge that there is pending a long drawn-out proceeding ought not be deemed to give notice of a step in that proceeding when specific notice of that step is statutorily required but not given.[2]

In the *Mullane* case, the statute provided for notice by mail to the known beneficiaries at the time when the trustee first invested in the common fund; this notice disclosed that there would be future judicial accountings by the trustee. Yet the Supreme Court held that this initial mailed notice did not excuse the omission of a notice by mail to known beneficiaries shortly before each subsequent judicial accounting.

Suggestive, too, are cases holding that, when a statute prescribes a particular form of notice which is constitutionally invalid, the defect is not cured by notice of a kind not provided in the statute. See, *e. g.*, *Wuchter* v. *Pizzutti*,

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[2] It is worth noting that railroad reorganization proceedings are almost always lengthy; this one lasted some twelve years. A creditor, hearing that they have begun, may not unreasonably sit back through the passing years, believing that he will be notified that the time has come for filing his claim.

276 U. S. 13, 24: "But it is said that the defendant here had actual notice by service out of New Jersey in Penn- [fol. 130] sylvania. He did not, however, appear in the cause and such notice was not required by statute. Not having been directed by the statute, it cannot, therefore, supply validity to the statute or to service under it."[3]

When, as here, the creditor, who knows of the reorganization proceeding under § 77, also knows, by reading § 77, that he is not to file a claim until notified to do so, it is curious to hold that his knowledge of the reorganization proceeding, without more, constitutes notice to file his claim, so that, if he does not file, his claim is expunged. Yet that is what my colleagues hold.

In so holding, my colleagues decide that the provisions of subdivision (c)(4)—as to filing lists of known creditors—and, more important, of (c)(8)—as to reasonable notice of the bar order—are virtually superfluous, that a perfect substitute for those provisions is found in the creditor's mere knowledge (however obtained) that the proceedings are pending. As above noted, my colleagues achieve this result by treating such knowledge as constructive notice of the bar order. Now such a constructive-notice clause is contained in § 17(a)(3) of the Bankruptcy Act, 11 U. S. C. § 35, which specifically provides that, although a creditor's claim is not scheduled by the bankrupt or filed by the creditor, it is barred by a discharge, if the creditor had actual knowledge of the proceedings.[4] I shall assume the validity of § 17a(3),

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[3] See also *Coe* v. *Armour Fertilizer Works*, 237 U. S. 410, 424-425; *In re Ives*, 314 Mich. 690, 23 N. W. (2d) 131, 134.

[4] This has been construed to mean knowledge in time to file and participate in the proceedings. 1 Collier on Bankruptcy (14th ed. 1940) par. 17.23, p. 1637.

In the Act of 1867, there was no equivalent of § 17a(3). Yet some lower courts held that claims omitted by inadvertence from the debtor's schedules, even if the creditors knew nothing of the proceedings, would be cut off by a discharge. See, e. g., *Lamb* v. *Brown* (D. C. Ind. 1875), 14 Fed. Cas. No. 8,011. I have little doubt that today such a provision would be held unconstitutional as to known creditors.

[fol. 131] despite the *Mullane* case.[5] But that provision is not applicable to § 77, which contains no equivalent.[6] I think that, especially as Congress deliberately omitted it from § 77, the courts may not read in such a constructive-notice clause. For such a clause—the consequence of which is that knowledge of a fact is fictionally imputed to one who has no actual knowledge of that fact—is ordinarily a creature of statute; courts usually will not impose the onerous burden of constructive notice on a litigant when it has not been imposed by the legislature. *Ex parte Caplis*, 275 F. 980, 986 (W. D. Tex.); *in re Leterman, Becher & Co.*, 260 F. 543, 547 (C. A. 2); *Burck* v. *Taylor*, 152 U. S. 634, 653-654. A court certainly should hesitate to do so when, in the light of the *Mullane* case, the validity of such an explicit legislative provision would be doubtful.[7]

The structure of § 77 makes it peculiarly unfair to import into it a judge-made, constructive notice clause: (1) In ordinary bankruptcy, to which § 17a(3) applies, there is no statutory provision—like § 77(c)(8)—requiring the judge to direct that a reasonable notice be given creditors of [fol. 132] a time within which they must file claims; a known

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[5] The Supreme Court has not directly held § 17a(3) constitutional, but has done so inferentially. *Hanover National Bank* v. *Moyses*, 186 U. S. 181.

[6] See 5 Collier, Bankruptcy (14th ed. 1943), par. 77.10.

In ordinary bankruptcy, a creditor, with knowledge of the date of the institution of the proceedings, knows that, under § 57n, his final deadline is six months and some odd days from that time, whereas the § 77 creditor can only speculate on what the judge will consider a "reasonable time" for filing claims under § 77(c)(7), and on when indeed the judge will set that date.

[7] The following cases—*distinguishable on their facts*—contain dicta contrary to my position: *Mohonk Realty Corp.* v. *Wise Shoe Stores*, 111 F. (2d) 287, 290 (C. A. 2); *Piedmont Ice & Coal Co.* v. *American Service Co.*, 130 F. (2d) 78 (C. A. 4); *North American Car Co.* v. *Peerless W. & V. Mach. Co.*, 143 F. (2d) 938 (C. A. 2); *Knapp* v. *Detroit Leland Hotel Co.*, 153 F. (2d) 715 (C. A. 6).

All these cases were decided before the Mullane *case.*

creditor cannot, therefore, argue that he was awaiting that notice before filing.[8] (2) But (as already observed) a known creditor in § 77 proceedings is reasonable (*i. e.*, not negligent) in waiting for receipt of the specific notice to file, because § 77(c)(8) tells the creditor that such a notice must be given him.

4. It is, then, pertinent that, as a general rule, judicially invented constructive notice is thought to be particularly objectionable where the litigant has not been guilty of gross negligence or fraud. See, *e.g.*, *United States v. Detroit Lumber Co.*, 200 U. S. 321, 333. In this connection, consider a few outstanding equities on the City's side:

(a) The City, even with full knowledge of the proceedings, might well have been misled into thinking that, notice or no notice, it did not need to file claims for its tax liens. The question had never been definitively answered by the Supreme Court. *Gardner v. New Jersey*, 329 U. S. 565, related on its facts only to the reorganization court's jurisdiction to adjudicate *in personam* tax debts which were a general lien on all tangible property of the bankrupt. The question of whether a filing was required of exclusively *in rem* claimants, with tax liens restricted to particular properties assessed, remained open, so far as I know, until today.

(b) The provisions of the plan itself may well have confused the City into thinking its claims would not be affected. Order No. 1, in 1935, authorized the trustees, without more, in their discretion, to pay all taxes or assessments due on the debtor's properties; this was clearly applicable to the City's tax liens. And the old railroad company did not list the City's claims in its asset-liability statement of debts to be affected by bankruptcy. Order No. 736, classi- [fol. 133] fying creditors and stockholders, set forth no classification of claims like the City's, although the order directed that the names of all creditors falling within the listed classes be sent to the Interstate Commerce Commission. The first ICC Report stated that the Plan should provide for the payment of all pre-bankruptcy liabilities which took priority over the mortgages—and the City's did. The Final Order transferred the property "subject to the

[8] See note 6, *supra*.

liens of taxes and assessments lawfully levied and assessed against" the real property. Section L of the Plan read:

"Claims against the principal debtor and secondary debtors, other than Old Colony, entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, shall be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of such debtors."

The trial judge has said that all these indications that the City was not meant to be affected by the plan should be disregarded because of the over-riding "intent of the plan that the reorganized company should take free and clear of all claims not filed in the reorganization proceeding." At first glance, it may seem that the judge, who participated in the shaping of the plan and who made the orders affecting it, is the best interpreter of the plan and those orders. But I recall these remarks of Lord Halsbury, about a draftsman's interpretation, in *Hilder* v. *Dexter*, 1902 A. C. 474: "My lords, I have more than had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language, which in fact has been employed."

[fol. 134] In any case, whatever the proper construction of the plan, the questions were close enough, I think, to excuse the City from jumping from the knowledge of the proceedings to the knowledge that it must file a claim. How much trouble would have been saved if the judge in accord with the statute, had only directed the trustees to mail notices to all known creditors to file their claims.

(c) I want to mention again the trustees' unexplained silence about the barring order, or the necessity for filing claims, in their dealings with the City, in 1936, 1940 and 1942, concerning the City's similar claims.

My overall conclusion is that justice has not been done in this case.

5. Finally, I have some doubt whether the district judge properly engaged in an interpretation of the plan and the court orders in their effect on the City's claims. Federal jurisdiction is patently but ancillary and of a kind to be exercised only "under unusual circumstances." *Ciavarella* v. *Salituri*, 153 F. (2d) 343 (C. A. 2); *Greenfield* v. *Taccillo*, 129 F. (2d) 854, 857 (C. A. 2); *Milando* v. *Perrone*, 157 F. (2d) 1002, 1004 (C. A. 2); *In re Devereaux*, 76 F. (2d) 522 (C. A. 2). Cf. *Prudence Bonds Corporation* v. *City Bank Farmers Trust Co.*, 186 F. (2d) 525 (C. A. 2). I see no such circumstances here.

[fol. 135] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of June one thousand nine hundred and fifty-two.

Present: Hon. Thomas W. Swan, Chief Judge, Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges.

In the Matter of THE NEW YORK, NEW HAVEN & HARTFORD RR Co., Debtor; THE CITY OF NEW YORK, Appellant.

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion of the District Court, ——F. Supp.——.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) Alexander M. Bell, Clerk.

[fol. 136] [Endorsed:] United States Court of Appeals for the Second Circuit. In the Matter of The New York,

New Haven & Hartford R.R. Co. (The City of New York). (213). Judgment. United States Court of Appeals Second Circuit, filed June 5, 1952, A. M. Bell, Clerk.

[fol. 137] Clerk's Certificate to foregoing transcripf omitted in printing.

[fol. 134] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 203

THE CITY OF NEW YORK, Petitioner,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ORDER ALLOWING CERTIORARI—Filed October 13, 1952

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.